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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

H. P. HEPBURN,
REPORTER.

Volume III.

SECOND EDITION.

WITH NOTES AND REFERENCES TO SUBSEQUENT DECISIONS,
By ROBERT DESTY,
ATTORNEY AT LAW.

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J U D G E S
OF
THE SUPREME COURT,
DURING THE YEAR 1853.

HUGH C. MURRAY.....CHIEF JUSTICE.

SOLOMON HEYDENFELDT..... }
ALEXANDER WELLS..... } ASSOCIATE JUSTICES.

ATTORNEY-GENERAL.

S. C. HASTINGS.



CASES REPORTED.

	PAGE
Abernathy, White v.....	426
Adams v. Town.....	247
Ah Thaie v. Quan Wan.....	216
Amador, Russel v.....	400
Argenti, Hyatt v.....	151
 Backus v. Minor.....	 231
Barnett v. Kilbourne.....	327
Bartlett v. Hogden.....	55
Bell, Hicks v.....	219
Bidleman, Evans v.....	435
Brannan, Carrier v.....	328
Brannan, Crane v.....	192
Brenham, People v.....	477
Brockmon, Fitch v.....	348
Brooks v. Lyon.....	113
Brooks, Wingate v.....	112
Brown v. Brown.....	111
Buchanan, Marysville v.....	212
Buckley v. Manife.....	441
Bullard, Otero v.....	188
Burgoyne v. Perry.....	50
Burnham v. Hays.....	115
Burritt v. Gibson.....	396
Burt v. Washington.....	246
 Call v. Hastings.....	 179
Campbell, Cotes v.....	191
Carrier v. Brannan.....	328
Caulfield v. Hudson.....	389
Cavillaud v. Yale.....	108
Chandler, Ramsay v.....	90

	PAGE
Chauviteau, Lubert v.....	458
Chenery, Estell v.....	467
Chever v. Hays.....	471
Chipman v. Emerie.....	273
Clarke v. Forshay.....	290
Clarke, Leese v.....	17
Clarkson v. Hanks.....	27, 47
Clymer v. Willis.....	363
Cochran v. Goodman.....	244
Cohas v. Raisin.....	448
Connalley v. Peck.....	75
Corbett, O'Conner v.....	370
Cornwall, Toothaker v.....	144
Cotes v. Campbell.....	191
Crane v. Brannan.....	192
Cunningham, Wilson v.	241
Dapman, Morrison v.....	255
Davis, Parsons v.....	421
Dodge, Wilcombe v.....	260
Dopkins, Johnson v.....	391
Dulton v. Shelton.....	206
Dumars, Helm v.....	454
Dunlap, Mills v.....	94
Eddy v. Simpson.....	249
Emerie, Chipman v.....	273
Engels, Montifiori v.....	431
Estell v. Chenery.....	467
Evans v. Bidleman.....	435
Fitch v. Brockmon.....	348
Forshay, Clarke v.....	290
Fouse, Stone v.....	292
Franklin, Middleton v.....	238
Gaskill v. Trainer.....	334
Geary, Surocco v.....	69
Gelston v. Whitesides.....	309
Gibson, Burritt v.....	396
Godfrey v. Rogers.....	101
Goodall, Kenyon v.....	257
Goodman, Cochran v.....	244
Gregory v. Hay.....	332

	PAGE
Hall, Tartar v.....	263
Hanks, Clarkson v.....	27, 47
Hanks, Vanderalice v.....	27, 47
Hanson, Webb v.....	65
Hanson, Webb v.....	103
Hanson v. Webb.....	236
Hastings, Call v.....	179
Hastings, Henly v.....	341
Hay, Gregory v.....	332
Hays, Burnham v.....	115
Hays, Chever v.....	471
Hays, Hostler v.....	302
Hays, Wheeler v.....	284
Helm v. Dumars.....	454
Henderson, Johnson v.....	368
Hendricks, Powell's Heirs v.....	427
Henly v. Hastings.....	341
Herman, Vandyke v.....	295
Hernandes v. Simon.....	464
Hicks v. Bell.....	219
Hogden, Bartlett v.....	55
Hostler v. Hays.....	302
Hoyt, Speck v.....	413
Hudson, Caulfield v.....	389
Hyatt v. Argenti.....	151
Johnson v. Dopkins.....	391
Johnson v. Henderson.....	368
Johnson v. Totten.....	343
Kashaw v. Kashaw.....	312
Keller v. Ybarru.....	147
Kenyon v. Goodall.....	257
Kilbourne, Barnett v.....	327
Kohler, Sparks v.....	299
Lafarge, People v.....	130
Lambert v. Slade.....	330
Lambert v. Smith.....	408
Larkin, Meyer v.....	403
Leese v. Clarke.....	17
Lewes v. Thompson.....	266
Lewis v. Myers.....	475
Lick v. O'Donnell.....	59
Linn v. Twist.....	89

	PAGE
Little, Ord v	287
Lubert v. Chauviteau.....	458
Lupton v. Lupton	120
Lyon, Brooks v.....	118
Manife, Buckley v.....	441
Marica, Peralta v.....	185
Marshall, Tendesen v.....	440
Marvin, Stearns v.....	376
Marysville v. Buchanan.....	212
Mayo v. Stansbury.....	465
McGilvery v. Moorhead.....	267
McNally v. Mott.....	235
Meyer v. Larkin	403
Middleton v. Franklin.....	238
Mills v. Dunlap.....	94
Mills, Ogden v.....	253
Minor, Backus v.....	231
Monroe, Williamson v.....	383
Montifiori v. Engels.....	431
Moor v. Teed.....	190
Moorhead, McGilvery v.....	267
Morrison v. Dapman.....	255
Mott, McNally v.....	235
Mott, People v.....	502
Moxley v. Shepard.....	64
Myers, Lewis v.....	475
Navis, People v.....	106
O'Conner v. Corbitt.....	370
O'Donnell, Lick v.....	59
Ogden v. Mills.....	253
Olds, People v.....	167
Ord v. Little.....	287
Otero v. Bullard.....	188
Palmer v. Reynolds.....	396
Parsons v. Davis.....	421
Patterson, Rhodes v.....	469
Payne v. San Francisco.....	122
Peck, Connalley v.....	75
People v. Brenham.....	477
People v. Lafarge.....	180
People v. Mott.....	502

	PAGE
People v. Navis.....	106
People v. Olds.....	167
People v. Peralta.....	379
People v. Raynes.....	366
People v. Smith.....	271
Peralta v. Marica.....	185
Peralta, People v.....	379
Perkins v. Wilson.....	137
Perry, Burgoyne v.....	50
Polack, Young v.....	208
Post, Tobin v.....	373
Powell's Heirs v. Hendricks.....	427
Quan Wan, Ah Thaic v.....	216
Rabe v. Wells.....	148
Raisin, Cohas v.....	443
Ramsay v. Chandler.....	90
Randall, Tooms v.....	438
Raynes, People v.....	366
Rosing, Southworth v.....	377
Reynolds, Palmer v.....	396
Rhodes v. Patterson.....	469
Rogers, Godfrey v.....	101
Russel v. Amador.....	400
Sacramento Co., Selkirk v.....	323
Sacramento Co., Wilson v.....	386
Sampson v. Schaffer.....	107
Sampson v. Schaeffer.....	196
San Francisco v. Payne.....	122
Schaffer, Sampson v.....	107
Selkirk v. Sacramento Co.....	323
Shaeffer, Sampson v.....	196
Shelton, Dulton v.....	206
Shepard, Moxley v.....	64
Simon, Hernandez v.....	464
mpson, Eddy v.....	249
Sinclair v. Wood.....	98
Slade, Lambert v.....	330
Sloan v. Smith.....	406
Sloan v. Smith.....	410
Smith, Lambert v.....	408
Smith, People v.....	271
Smith, Sloan v.....	406, 410

	PAGE
Snyder v. Webb.....	83
Southworth v. Beasing.....	377
Sparks v. Kohler.....	299
Speck v. Hoyt.....	413
Stansbury, Mayo v.....	465
Stearns v. Marvin.....	376
Stevens v. Stewart.....	140
Stewart, Stevens v.....	140
Stone v. Fouse.....	292
Surocco v. Geary.....	69
Sutter, Whitman v.....	179
Tartar v. Hall.....	263
Teed, Moor v.....	190
Tendesen v. Marshall.....	440
Thayer v. White.....	228
Thompson, Lewes v.....	266
Tobin v. Post.....	373
Tooms v. Randall.....	438
Toothaker v. Cornwall.....	144
Totten, Johnson v.....	343
Town, Adams v.....	247
Trainer, Gaskill v.....	334
Twist, Linn v.....	89
Vanderbilt, Wakeman v.....	380
Vanderslice v. Hanks.....	27
Vanderslice v. Hanks.....	47
Vandyke v. Herman.....	295
Wakeman v. Vanderbilt.....	380
Washington, Burt v.....	246
Webb v. Hanson.....	65
Webb v. Hanson.....	103
Webb, Hanson v.....	236
Webb, Snyder v.....	83
Wells, Rabe v.....	143
Wheeler v. Hays.....	284
White v. Abernathy.....	426
White, Thayer v.....	228
Whitesides, Gelston v.....	309
Whitman v. Sutter.....	179
Wilcombe v. Dodge.....	260
Williamson v. Monroe.....	383
Willie, Clymer v.....	363

	PAGE
Wilson v. Cunningham.....	241
Wilson, Perkins v.....	137
Wilson v. Sacramento Co.....	386
Wingate v. Brooks.....	112
Wood, Sinclair v.....	98
Yale, Cavillaud v.....	108
Ybarra, Keller v.....	147
Young v. Polack.....	208

OCTOBER TERM, 1852.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT,
OCTOBER TERM, 1852.

[The case of *Leese and Valejo v. Clarke*, and that of *Vanderslice and Clarkson v. Hanks*, were decided at October Term, 1852, but as a rehearing was granted at January Term, 1853, in the latter case, for the purpose of reconsidering the principles of law involved in both cases, it was deemed proper to delay the report of both till the publication of the present volume, so as to present the law as it might be ultimately decided.]

A report of the rehearing and final decision of the Court in the case of *Vanderslice and Clarkson v. Hanks* will be found in its proper place, in January Term of this volume.]

LEESE & VALEJO, Appellants, v. CLARKE, Respondent.

JURISDICTION OF STATE COURTS.—If the Courts of this State can entertain jurisdiction of titles to land granted by a Mexican governor, antecedent to the acquisition of the country by the United States, without previous confirmation or legislative recognition?

MEXICAN GRANTS, TESTS OF VALIDITY.—Prior to the 24th May, 1821, the laws or decrees of the kings of Spain, and the regulations or usages of their governors, (who were mere deputies,) sanctioned by royal approval or acquiescence, afforded the proper tests by which to determine the validity of grants.

IDEM—AUTHORITY TO MAKE.—Since the revolution, (24th February, 1821,) no valid alienation could be made, except by an act of Mexican sovereignty.

IDEM—MEXICAN LAW.—By the law of the Mexican Congress of 18th August, 1824, limited and defined by that of November 21st, 1821, the governors of territories were authorized to *grant, with certain specific exceptions, vacant lands, etc. By these laws and the legislation of the departmental legislature, consistent therewith, must be determined the validity of any grant of land in California.

IDEM—VALIDITY OF GRANT, HOW DETERMINED.—To these regulations this Court alone look, and by them every grant must be determined. If not fully complied with, the title did not pass, but remained in the government of Mexico.

IDEM—TITLE WHEN INCHOATE.—A mere grant, without further compliance with the requisitions, is at best but an inchoate title, and the *land* passed to the United States, who hold it subject to the trust imposed by the treaty of cession and the equities of the grantees.

TREATY, EXECUTION OF TRUST UNDER.—The execution of this trust is a political power to which the judiciary is not competent.

¹ **EJECTMENT, TITLE INSUFFICIENT TO MAINTAIN.**—Where the title of the plaintiff is inchoate and incomplete, he cannot sustain an ejectment, and the Court properly excluded such title as testimony.

APPEAL from the Superior Court of San Francisco.

The complaint in this case alleged that, on the 12th May, 1839, the plaintiffs petitioned the Governor of Alta California, Juan B. Alvarado, at Monterey, the capital thereof, in consideration of certain moneys advanced, and services rendered the government in California, to grant to them two certain lots of land, of one hundred varas each, with twenty-five varas in the sea, commencing at the Embarcadero of Yerba Buena, as follows [here proceeds the description in Spanish, and afterwards translated into English]; that on the 21st day of May, 1839, the said Alvarado, in virtue of his authority as governor, and in accordance with the said petition, ceded and granted to the plaintiffs the said two hundred varas of land, with the twenty-five varas in the sea, at the place designated in the said petition, thereby granting the absolute property in fee to said land to the plaintiffs, as by a copy of said petition and grant, herewith filed, will appear; that all the land so granted is within the limits of the city of San Francisco, and the twenty-five varas in the sea within the present harbor or Bay of San Francisco, and the place designated in the grant as the Embarcadero, or landing-place, of Yerba Buena, is at the foot of the street known on the map of San Francisco as Broadway, which street intersects with

¹ Distinguished, *Vandallice v. Hanks*, post 46; approved, *Clarkson v. Hanks*, Id. 48; commented on, *Gunn v. Bates*, 6 Cal. 269; *Tobin v. Walkinshaw*, McAll. 163; overruled, *Ferris v. Coover*, 10 Cal. 621. Case cited as overruled, *Hart v. Burnett*, 15 Cal. 598, 606. As to Alcalde grants, cited as inapplicable, *Welch v. Sullivan*, 8 Cal. 198. See same case, 18 Cal. 535; 20 Cal. 387.

the water line of the bay at high water. The plaintiffs further show, that the defendant, H. T. Clarke, is now in possession of a certain portion of said two hundred varas of land, against the consent of the plaintiffs, and *without their [19] authority—that portion on the map of said city known as lot No. 327 [describing it], and refuses to deliver possession of said portion, (as well as other portions of said land, of said twenty-five varas in the sea, which the said defendant claims against the consent and authority of the plaintiffs,) although demanded, etc.

That said defendant is indebted to said plaintiffs in the sum of \$200,000, for the withholding of said land, and for the issues, use, rents, and occupation thereof, and refuses to pay therefor. The plaintiffs therefore pray that defendant may be condemned to deliver up to the plaintiffs the said lot, as above described, as a portion of the two hundred varas, and to pay to them the said amount of money for the use, etc., thereof, together with costs, etc.

The defendant, for answer, denies all and singular the allegations of the said complaint, and requires strict proof. And further, says, that he has no knowledge of the pretended grant mentioned in said complaint, and denies that any such grant was ever made; has no knowledge of the pretended original document, whereof pretended copies and translations are filed, and denies the same, and requires proof. And denies that said pretended grant covers any portion of property in possession of defendant, or that any of the property described as in the possession of defendant is covered by the said pretended grant, and denies that plaintiffs have any right, claim, or title whatever, to any portion of the property described in said complaint as in the possession of said defendant, and denies indebtedness to plaintiffs in any sum whatever, etc., and prays to be dismissed with costs, etc.

A great deal of evidence was given on the part of the plaintiff in support of the several allegations of this complaint, and a great many exceptions taken, when the following offer was made:

“Plaintiffs’ counsel then offered in evidence the grant from Juan B. Alvarado to plaintiffs, dated Monterey, 21 de Mayo

de 1839, for the purpose of showing color of title, and the title under which the plaintiffs entered upon the land described in the grant, including this land in controversy, and the immediate and exact boundaries of the land; to [20] which the defendant's counsel *objected, and the Court sustained the objection, to which plaintiffs' counsel excepted."

The grant mentioned in the preceding offer was founded upon the petition of the plaintiffs. And both are placed upon the record, in the Spanish language, accompanied by translations, as follows:

[TRANSLATION OF PETITION.]

To the most excellent Governor of Upper California, Don Juan Baptiste Alvarado:

We, the undersigned, Jacob P. Leese and Salvador Valejo, appear before your Excellency in the best form, and say that, considering that the want of funds in the treasury of the country prevents your Excellency from repaying us the expenses we have made, by your order, in boats, transportation of troops, couriers, and other services, including those made by us personally, at this place, at Santa Clara, San José, Sonoma, and San Rafael, for the restoration of public tranquillity, we have thought proper to enter into a contract with Pedro Kostronutineoff, the commander of Ross, to build some houses, stores, and a wharf, at this place, and so we require two lots for the said buildings; we pray your Excellency to grant us two lots, of one hundred varas each, at the point known as the Desembarcadero [landing-place] of Yerba Buena, the said lots beginning at the point of the Desembarcadero, [and running] on the seashore as far as the Ployita, in a northerly course, making the front of two hundred varas, and in depth east and west one hundred varas, towards the hill; we also ask for twenty-five varas in the sea, from the point of the Desembarcadero itself, for the construction of a wharf, which we mentioned. We therefore pray your Excellency to grant us the favor, which we shall receive with

thanks; excusing us for using common paper, as there is none stamped.

JACOB P. LEESE.

SALVADOR VALEJO.

San Francisco, May 12, 1839.

*[COPY OF TRANSLATION OF GRANT.]

[21]

"Monterey, May 21st, 1839.

"The two lots, of one hundred varas each, are [SEAL.] granted to the petitioners, Don Jacobo Leese and Don Salvador Valejo, at the place and with the boundaries which they described, for the purpose of erecting their stores; upon the conditions hereinafter set forth, provided the commandant at the Presidio at Ross, is to have no right whatever to the said grant, as the land granted is considered as the property of Mexicans, as the above-named petitioners are: 1st. At no time, and for no cause whatever, shall the commander of Ross regard himself as the owner of the stores, as all the buildings which may be constructed are to be regarded as the property of a Mexican citizen. 2d. This license does not destroy, nor in any way injuriously affect, the laws or dispositions of the government of the nation, or of that of this department, with respect to the trade or the privileges which the Russians may or may not heretofore enjoy, on entering the Bay of San Francisco for the purposes of trade, as their private contract does not authorize any right of any kind, either as regards the individuals interested or the trade above mentioned. 3d. The wharf which is to be constructed, cannot be exclusively for the benefit of individuals, but shall be considered as the property of the government, for the use of trade in general. The government itself will impose such wharfage duties as it may consider proper. 4th. If the persons to whom this favor is granted should contravene these provisions, they shall lose their rights, as well to the buildings as to the lots awarded to them, which shall belong to the nation, for such uses as it may choose to make of them.

"I, Don Juan B. Alvarado, the Governor of the Department of California, order this to be delivered to the petition-

ers, to serve as a title for them; note being entered thereof on the proper book.

“JUAN B. ALVARADO.

“MANUEL JIMENO,

“Secretary of the State.”

[22] * “Note has been taken hereof, in the office under my charge, in the book kept for this purpose, seat of
“JIMENO.

“Monterey, May 21st, 1839.”

After the said offer, including the grant, was rejected by the Court, the plaintiff proceeded with his testimony at length, and was succeeded by the defendant. But, for the reasons given in the opinion of this Court, it is not necessary to report the exceptions taken to the testimony, further than the one already mentioned, upon which the decision of the case turned.

The jury found for the defendant, and the plaintiffs appealed. (There are no briefs on file.)

MURRAY, Chief Justice, delivered the opinion of the Court.

ANDERSON, Justice, concurred, “that the judgment of the Court below be affirmed.”

This was an action of ejectment brought by the appellants to recover possession of a certain tract of land, situated in the city of San Francisco. The whole record is encumbered with exceptions to the various rulings of the Court below, which are unnecessary to be considered, as the case must ultimately turn on the question, whether the grant under which the plaintiffs claim title is sufficient in law to sustain an ejectment.

The grant under which plaintiffs claim, purports to have been made to them May 21st, 1839, by Alvarado, Governor of California, prior to its acquisition by the United States.

Assuming for the present that the courts of this State can entertain jurisdiction of titles of this description without previous confirmation or legislative recognition, a position to which this Court is by no means to be considered as assenting, and that the land in question was public domain of

Mexico at the time of its alienation, it is necessary for us to ascertain the regulations established by the government of Mexico in relation to grants of land, and whether the present one under consideration is sufficient and in conformity to the law.

It may be as well to observe in the outset, that the authorities cited by counsel and supposed to be conclusive by many in relation to the decisions of Louisiana and Florida land claims, and *the laws and decrees of Spanish [23] monarchs, together with the usages of the royal councils and governors, have no particular weight as authority in the decision of this case.

Prior to the Mexican revolution which produced the Plan of Iguala, February 24, 1821, the unappropriated lands in this country constituted a part of the domain of the Spanish monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the king, and exercised the sovereignty in his name.

His will, manifested in the form prescribed by his regulations, operated as a valid alienation of the public domain. His governors, acting under his authority, and in his name, were the mere executors of his will—whence the law or decrees of the kings, and the regulations and usages of their governors, sanctioned by royal approval or acquiescence, afforded the proper tests by which to determine the validity of grants of land belonging to the nation whose sovereignty those kings represented and exercised, and they are accordingly consulted and relied upon by the Courts of the United States in adjudicating Spanish claims in Florida and Louisiana. But on the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico, except by an act of Mexican sovereignty. The royal decrees, regulations, and usages, ceased to have any effect whatever as to subsequent grants of land.

This point was determined by the Mexican Congress, in a case which arose shortly after the independence of that gov-

ernment, and has ever since been acquiesced in. On the 17th of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas. On the 19th of August, the Mexican governor of that province, (Martinez,) assuming the powers properly exercised by the royal governors, modified the grant in favor of the younger Austin.

Had the royal laws and usages still continued to retain their force, the acts of Martinez would have been valid, but the Mexican Government, at the same time it recognized the act of the royal governor as valid, because done before [24] the change of *sovereignty, refused to confirm the act of its own governor, done after the change, on the ground that the sovereignty could be exercised only by the Mexican nation. The subject attracted public attention, and the Mexican Congress were about passing a general law in relation to the alienation of public lands, when Iturbide forcibly dispersed the members of that body, and caused himself to be proclaimed emperor.

On the 4th of January, 1823, he promulgated a general law on the subject, but being shortly afterwards deposed, Congress, on the 11th of April, 1823, suspended that law. On the 18th of August, 1824, Congress enacted a general colonization law, prescribing the mode of granting public lands throughout the Mexican territory. (1 White's Recop. 561, 8, 71, 76, and 82.)

That law was limited and defined by a series of regulations ordained by the Mexican government (November 21, 1828.) By these laws and regulations, which have ever since continued in force, the governors of territories were authorized to grant, with certain specified exceptions, vacant lands, etc. (Congressional Documents relative to California, 1850, p. 120-1.)

By the fundamental law of '24, the regulations of 1828, and the legislation of the departmental legislature consistent therewith, must be ascertained and determined the validity of every grant of land in California.

Art. 2d, of the Act of '28, declares, that within it are comprehended, "those lands of the nation, not the property of

individual corporations or towns, which can be colonized." The 3d article provides, that "the legislatures of all the States will, as soon as possible, form colonization laws, regulating for their own States, conforming themselves in all things to the constitutional acts, general constitution, and the regulations established in this law."

The 4th article provides "that no lands shall be colonized within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coast, without the previous approbation of the supreme executive power."

The first article of the regulations of '28, referred to, declares that "the governors of territories are authorized, in compliance with the law of '24, and under the conditions hereinafter specified, to grant vacant lands in [25] their respective territories, etc., for the purpose of cultivating and inhabiting them."

Art. 2d. "Every person soliciting lands shall address to the governor of the territory a petition, describing as distinctly as possible, by means of a map, the land asked for."

Art. 4th. "The governor will accede or not to such petitions, in exact conformity to the laws on the subject, and especially to the laws of 1824."

Art. 5th and 6th. "The grants so made shall not be held to be definitively valid, without the previous consent of the territorial deputation, to which end the respective documents (*expedientes*) shall be forwarded to it. When the governor shall not obtain the approval of the territorial deputation, he shall report to the Supreme Government, forwarding the necessary documents for its decision."

Art. 8th. "The definitive grant asked for, being made, a document, signed by the governor, shall be given, to serve as a title to the party interested, *wherein it must be stated*, that-said grant was made in exact conformity with the provisions of the law, in virtue whereof possession shall be given."

Art. 9th. "The necessary record shall be kept in a book, destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, etc."

I have cited these regulations to show that the alienation of the public domain of Mexico was a subject of careful con-

sideration with that government, hedged around with an infinity of restrictions for the protection of the sovereignty, and that the loose and careless conduct of her governors, in executing this trust, was not approved by the Supreme Government, although removal from the scene, and the insignificant value of the lands at that time, seemed to divert public attention from these abuses.

To these regulations this Court can alone look, and by them every grant must be determined. Had we the power to discriminate, its exercise would be more dangerous, and productive of more injustice, than the total inability to go beyond them.

If the officers of the Mexican government, to whom was confided this trust, exceeded their authority or neglected the solemnities and formalities of the law, this Court is [26] bound to take *notice of it, and cannot shield those claiming under such titles from the necessary consequences of ignorance, carelessness, or arbitrary assumptions of power.

The grant from Alvarado to Leese and Valejo contains nothing but a petition and grant of the governor. There is no map attached, no survey, record, or evidence, that the plaintiffs have ever been put in judicial possession, no act of the territorial deputation confirming the act of the governor, or evidence that the grant, together with the map, were recorded in a book, kept by law as a record of said grants, as provided in sec. 9th of the act of '28. But that these requisitions must be fully complied with, this Court has no doubt, without which a severance of the land from the public domain and a rigid adherence in all other respects, the title did not pass to the grantees, but remained in the government of Mexico.

The title at best can only be considered as inchoate. It passed with the map of the property of Mexico to the United States, who now hold it, subject to the trust imposed by the treaty of cession and the equities of the grantees.

The execution of this trust, however, is a political power, to which the judiciary is not competent, until made so by legislation. (*Menard's Heirs v. Massey*, 8th Howard; *Boisdore v. United States*, *ibid.*)

In the case of *Menard's Heirs v. Massey*, already cited, the Court held, that every step pointed out by the law must be complied with, and although a grant and survey were regularly recorded, yet without the approval of the Intendant General, the grantee did not become the owner, and the title remained in the sovereign, notwithstanding the Intendant always confirmed the grants, or had never been known to reject one.

If the Governor of California possessed any authority to make this grant, and the land so granted was at the time part of the public domain of Mexico, then the government of Mexico retained the power to confirm or reject it. That power was a political one, and passed to the United States under the treaty of cession, to whom the exercise of it belongs. In the same case, the Court held that, "No suit can be brought in an ordinary action of ejectment on a concession and survey, for want *of strict legal title to [27] sustain it. Such claimants were not regarded as the owners of the land until the real title was delivered, completed, in the language of Spanish regulation. It was therefore manifest, that claims resting on the first incipient steps must depend for their sanction and completion upon the sovereign power.

"No standing has therefore ever been allowed in any ordinary judicial tribunal, until Congress has confirmed them, and vested the legal title in the plaintiff."

Many arguments have been adduced to demonstrate that the grant to Leese and Valejo is absolutely void. It is not our purpose to follow this matter further than the necessities of the case require.

Holding as we do that the law of '24, and the regulations of '28, must be strictly complied with, that the title of the plaintiffs at best is inchoate and incomplete, and therefore insufficient to maintain ejectment, we are of opinion the Court below properly excluded it as testimony. Whatever errors may be found in the record on other points is a matter of no moment, and the Court sees no reason for sending this case back.

The judgment of the Court below is therefore affirmed.

VANDERSLICE & CLARKSON, Appellants, v. JULIAN HANKS, Respondent.

MEXICAN GRANT, VALIDITY HOW TESTED.—A grant of land made while the country was under the dominion of Mexico, must be tested by the rules of law which then prevailed. The cession to the United States has worked no change in the legal rights of private persons.

IDEM, POWER TO MAKE GRANT.—The power of the Mexican Government to grant land is derived from the Congressional decree of 1824, and the regulations of 1828.

IDEM, PRESUMPTIONS AS TO OFFICIAL ACTS.—When the regulations require that a grant shall not be held to be sufficiently valid without the previous consent of the Territorial Deputation (legislature,) and provides that the definitive grant being made, a document signed by the governor shall be given to serve as a title to the grantee, and the governor delivers the title, the presumption arises that the governor fulfilled his duty, and that the grant had the approval of the legislature, and if the contrary be asserted, it must be shown by proof.

[28] **IDEM.**—*Nor is this view weakened by the words in the deed, "subjecting himself (the grantee,) to the approbation of the most excellent departmental assembly."

IDEM, IN CASE OF LOST RECORDS.—And is strengthened in view of the disordered state of the country, the irregularity of legislative proceedings, and the absence or loss of these records.

IDEM, APPROVAL A CONDITION SUBSEQUENT.—If it was the duty of the grantor to obtain the legislative approval, and the governor, who had the sole power, had exercised it, and made the grant, the necessity of obtaining their approval was a condition subsequent to the grant.

IDEM, WHEN GRANT BECOMES ABSOLUTE.—A grant made on a condition subsequent, where no time is limited for its performance, and the condition becomes impossible, the grant becomes single and absolute in the grantee.

¹ **IDEM, NO FORFEITURE ON FAILURE OF SURVEY.**—When the land granted is described by specific boundaries, and the deed is accompanied by a diagram or plot, which it expressly mentions as descriptive, although more land is contained within the description than the quantity called for by the grant, and a judicial survey is required to be made by the grantee, the failure to procure such survey works no forfeiture: it can be made at any time.

IDEM, TITLE TO SURPLUS LAND.—When such grant contains a surplus, the title is good for the whole lot, defeasible for the surplus.

IDEM, DENOUNCEMENT OR FORFEITURE.—If the grantee neglect the directions imposed by the grant, his land may be *denounced* and granted to another; or it may be forfeited to the government; but in the absence of denouncement or forfeiture, his right to the whole is good against the world.

IDEM, PUEBLO LAND GRANTS.—To sustain a grant from a town, it is necessary to show that the lands granted were the property of the town.

EVIDENCE, ADMISSION OF HEARSAY AS TO BOUNDARIES.—Hearsay evidence, with regard to boundaries of parishes or towns, is only received where such boundary is of remote antiquity; and query, if ever it should be received to affect a private right.

¹ Distinguished, *Touchard v. Touchard*, 5 Cal. 307. Case cited as overruled, *Hart v. Burnett*, 15 Cal. 598, 606.

APPEAL from the District Court of the Third Judicial District, for the county of Santa Clara.

This was an ejectment brought by the plaintiffs for the recovery of a tract of land in Santa Clara county. The plaintiffs claimed to be the legal owners in fee-simple, and entitled to the possession thereof, which is thus described in the grant, as translated from the Spanish: "Two locations for large cattle, within the lands named St. John Baptist, adjoining the rancho of Gentleman Luis Bernales, the ranch of Justo Larios the Sierra, with the spot or place of the Hernandez and the Pueblo of San José, without encroaching on the Alisal which belongs to the latter place," by virtue of a grant made in due form of law by the Citizen Manuel Michel-toreno, Governor, etc., to Augustin Narvaez, on the 13th March, 1844, (see this deed or grant set out *in [29] full in the opinion of the Court,) which grant was accompanied by a map or plot of said land from the same source, and by virtue of a deed from said Narvaez to complainant, made the 25th April, 1850. That long after the deed to Narvaez, but before his deed to complainant, the defendant entered upon and took possession of said tract of land, and has ever since held, and continues to hold, unlawful possession of the same. That plaintiffs, after their purchase from Narvaez, took possession of part of said tract of land in the name of the whole, and pray judgment, etc.

The defendant's answer denies all the allegations of the complaint, and further says, that he is possessed of said land as owner thereof, by virtue of a grant, lease, or loan, from John Burton, the Alcalde of San José, from the 30th day of August, 1847, which grant, etc., is hereto annexed as part of this answer, and that he has fulfilled all the conditions of the grant, etc., and prays to be dismissed.

The grant under which plaintiffs claim, as will be seen, was for two leagues, more or less, to be surveyed according to the map or "*dicino*" which accompanied the grant. The tract embraced in the boundaries described contains considerably more than two leagues. Narvaez took possession under the grant, and has ever since continued on the tract. His deed

to plaintiffs in 1850 was for the whole tract, except two leagues, which he reserved to himself, and for which two leagues the plaintiffs executed a release or quit-claim to him.

On the trial, the plaintiffs gave in evidence the grant from Micheltoreno to Narvaez, and map. The conditions of the grant, as will be seen, are: 1st. That it shall be approved by the departmental assembly. 2d. That the grantee shall solicit to be put in possession by the proper officer. 3d. That the tract granted shall contain two leagues, a little more or less, according to the map, and that the magistrate who shall give him the possession, shall cause the land to be measured according to ordinances, and that the overplus "shall remain to the nation," etc.

The plaintiffs gave in evidence, also, the deed from Narvaez to them, in which the land is described substantially as in the grant; the two leagues are described by metes and [30] bounds, and are *reserved, as stated above. The plaintiffs then proved the boundaries, as described in the grant and map, and that defendant was in possession of 500 acres within the tract, but outside of the two leagues reserved to Narvaez; and also proved the possession of Narvaez for twenty years, and that his claim was understood in the neighborhood to extend to the boundaries described in the grant and the map.

The defendant offered in evidence a deed from John Burton, Alcalde of San José, of April 30th, 1847, for the 500 acres in controversy. From the view taken of the case by the Court, it is unnecessary to note further the peculiarities of this instrument, or the exceptions taken to it.

The defendant also gave in evidence a deed from the Mayor of San José, which comes within the above remark, and there was hearsay proof that the land in dispute was included within the ancient boundaries of the Pueblo of San José.

The plaintiffs moved the Court to instruct the jury:

1st. That the original grant and "*dicino*" formed but one title, and are to be considered together.

(This was given with the qualification, "that the grant does not necessarily embrace all within the '*dicino*.'")

2d. That if the jury find from the evidence that defendant

is upon the land enclosed within the "*dicino*," they should find for the plaintiffs. (Refused.)

3d. That the possession of Narvaez, plaintiffs' grantor is the possession of plaintiffs, and that plaintiffs have the same right to maintain this action that Narvaez originally had. (Given.)

In charging the jury, the Judge said:

"That the rule of the civil law which governed in this case was, that in the construction of the description of land, as contained in a deed or grant, when natural boundaries are set forth, and the quantity of land is stated, in case of a variance of quantity on actual survey, by the boundaries expressed, the quantity of land is governed by the actual boundaries; but when *artificial* boundaries are set forth, and the quantity of land granted is stated, in case of a variance on actual survey, the quantity expressed in the grant should govern; that in the case at bar, the land being described by boundaries partly *natural* and partly **artificial*, and the quantity being expressed, and a variance found, that the rule of *artificial* boundaries governed, and the grantee should be limited by the quantity expressed in the grant, which should be surveyed off to him within the limits described." [31]

The plaintiffs excepted to the qualification of the first instruction, the refusal of the second, and to the charge, and a verdict and judgment having been rendered for the defendant, the plaintiffs appealed.

Crockett and Wells, for Appellant.

The grant from Micheltoreno to Narvaez was valid, and vested the title in the grantee. It was not incumbent on plaintiffs to show that Narvaez had complied with the conditions; the grant was absolute, and conveyed the title, subject to be defeated by a failure to fulfil the conditions, "he shall lose his right to the lands, and it shall be denounceable by another." The conditions were to be performed subsequently to the grant, and in such cases none but the grantor can avail himself of a failure. (Walker, 119; 7 Pick. 111; 9 Mass.

501; 7 Conn. 201; 3 Mo. 40; 1 Overton, 370; 18 Conn. 535; 11 Paige, 414; 8 N. H. 477.)

It was not necessary to show that the grant was approved by the departmental assembly. There was no time limited within which the approval should be obtained, before the cession of the country to the United States. Since the cession, the condition has become impossible, because there is no such body; and this is true of the condition requiring application to the magistrate for the judicial possession. (Raw's Rep. 652; Sto. on Cont., sec. 32; 2 Sto. Eq. 1304-6; 6 Pet. Rep. 691; 6 Greenl. 430; 2 Wend. 517.)

The grant, and the map or *dicino*, which accompanied it, are to be construed together. The fourth condition of the grant expressly refers to the diagram for the description of the land granted, and its boundaries. The endorsement on the diagram shows that it accompanied the grant as one of the muniments of title, and the proof is, that the latter was predicated upon it. There was therefore error in the qualification added by the Court to the instruction. (4 Mass. 149; 6 Ser. and Raw. 488; 17 Mass. 207-11; 1 Greenl. 219; 20 Pick. 62.)

[32] *The boundaries called for are all *natural*, and not partly natural and partly artificial, as stated in the charge, and the Judge therefore mistook the facts, and thus the jury were misled. When the boundaries are marked and defined, the whole quantity embraced within them will pass. Course, distance, and quantity must yield to the actual, visible boundaries, as called for in the grant. (2 Mass. 380; 6 Mass. 131; 11 Mass. 193; 5 Mass. 494; 1 Har. & J. 167; 1 Con. 605; 2 N. H. 303; 3 Fairf. 320; 2 Roy, 575; 3 Pick. 401; 5 Pick. 135; 13 Pick. 145; 5 Har. & J. 163; 3 Hain. 282; 5 Ib. 534; 5 Con. 371; 9 Ib. 661; 13 Wend. 300; U. S. Dig. 474, secs. 15-39.)

The overplus could only be ascertained by the measurement of the magistrate. This measurement never was made, and until made, the grantee had title to the whole; and this condition has become impossible by the change of government. The defeasance is therefore void. The title passed *in presenti*, and the whole vested or none. "I have deter-

mined to concede to him the land mentioned, *declaring to him the ownership thereof by the present letter.*" The overplus has not been, and now cannot be, ascertained in the form prescribed by the grant, and the grantee's title is therefore good for the whole.

The subsequent clause reserving the overplus to the nation, was void if not construed as a defeasance, and cannot be regarded as a reservation repugnant to the grant. If a defeasance, the condition to give it effect has become impossible, as above explained. (3 Pick. 272.)

The possession of Narvaez more than twenty-one years, was possession of the whole, and he had claimed the whole from 1844. Possession will maintain ejectment against a trespasser or any one not showing a better title.

But plaintiff has shown a *prima facie* title in addition to his possession, and defendant being a mere trespasser, cannot question it. Courts in such a case will not look very closely into the plaintiff's title. (9 Mo. 477.)

Defendant's title as set up is absolutely void. There is no legal proof that the land in controversy ever belonged to the town or Pueblo of San José, or that there ever was a grant for the same from the Mexican or Spanish government except to Narvaez.

*When the terms of a grant are vague, or the boundaries doubtful, they are to be taken most strongly against the grantor. (8 Com. Rep. 369-5; Har. & J. 163. [33])

Jones, for respondent. The title of plaintiff under Narvaez is defective, because the grant was within the limits of the Pueblo de San José de Guadalupe. There was no direct grant to the Pueblo of common lands proven, but they were acquired by the operation of law as the result of her legal establishment as such, and by preëmptive right.

The Pueblo was founded in 1777, under directions to the Governor Neva by the viceroy of Mexico. On the 1st of June, 1779, Governor Neva drew up regulations for the government thereof, which were approved by royal order, Oct. 24, 1781. (*Vide* Halleck's Translation and W. C. Jones' Rep.)

The Pueblo was acknowledged by various acts of the

Spanish government, and by the departmental government of California, and the known and fixed boundaries of her common land recognized. (*Vide* Annellaga's Recopelation, p. 163, Title XIV., of May 8, 1838.)

The quantity of land granted to a Pueblo, on its establishment, was four leagues square, or sixteen superficial leagues. (*Vide* Recopelation de Indas, Vol. 2, Book 4, Title V., Con. 6, and Title XIV., also W. C. Jones's Rep., p. 31 and 32.)

Common and pasture lands were granted by the royal decree of 1781. (*Vide* Halleck's Translation.)

The grant of the Pueblo must be presumed, from long usage and the exercise of right *within* the boundaries, proven to have existed for three-fourths of a century with known and fixed monuments. (*Vide* Esencho, p. 532, 34, 35.)

The Pueblo has a grant by preëmption and by operation of law. (*Vide* Esencho, p. 551, 2.) The common lands were inalienable, even by the Crown itself; consequently, no grant was valid. (*Vide* Noviscino, Recop., Vol. 3, p. 382, Titulo XVI., Book VI., Con. 1, and White's Recop., Vol. 2, p. 100, 111, 113.) They were given for common usage and as a source of revenue, and could only be leased, the lessee paying a rent-charge for a definite period.

[34] *They were called hereditaments in the law of Spain; and the Pueblo held said lands in perpetual succession. All grants were therefore absolutely void. The boundaries of the Pueblo de San José were known and fixed in 1800, and confirmed in 1836, and the monuments renewed under the government authority. Ancient monuments not only fix the extent of the boundary, by the law of Spain, but are evidence of *title* to their extent. (*Vide* Esencho, p. 435.)

The evidence shows that the grant to Narvaez was within the ancient limits of the Pueblo bounds, and no consent of the Pueblo prior to such grant, and no rent-charge paid in the terms of the grant. So a tax must be paid to the Pueblo for land granted on their common, and all grants are of this character, save the grant to Narvaez. Even the grants under tax or rent-charge were not good, save by the consent of the Pueblo; and this the plaintiff has not shown.

The title to the land claimed by the plaintiff is in the

United States or in the Pueblo; for the authorities of California had no right to grant Pueblo common lands in absolute title.

The title of Narvaez never was confirmed by the Departmental Assembly, and is inchoate and imperfect, wanting the sanction of a coördinate branch of government to make it good. (*Vide* Annellaga's Recopelation, and Decrees of the Mexican Congress.)

Juridical possession never was given: there was therefore no severance of the Pueblo domain. There was no survey as required. (See *Ashly v. Crane*, 7 Wend. 99, and 4 Rep. 517.)

The common lands of the Pueblos have been invariably confirmed by the general government of the United States, as in the action of the commissioners to settle land titles, and Congress, in Louisiana, Florida, and Missouri; the Pueblos of St. Louis, St. Charles, and St. Genevieve. (*Vide* Acts of Congress, Repts. of Commissioners, and Mo. Repts.)

If the lands in question are not Pueblo common lands, they are part of the public domain of the United States, and the defendant in possession should not be disturbed. (*Vide* *Sunol v. Hepburn*, 1 Cal. 254.)

The grant to Narvaez was intended to grant but two leagues, which it specified was to be surveyed by the proper officer, the *overplus to remain a part of the [35] public domain. All the clauses in a contract must be considered in its construction; that clause therefore which gives to the grantor "two leagues, a little more or less," must be taken in connection with that clause which specifies that he must have the two leagues surveyed by the proper officer, and the clause that the surplus shall remain to the government.

Public grants must be construed strictly, and not extended beyond their natural import by implication. (8 Pet. 738; 3 Pet. 289; 4 Pet. 168; *Ib.* 514;) and therefore the grant to Narvaez cannot be taken to include *three leagues and one-tenth*, the quantity now claimed, when the object was to convey but two.

Natural boundaries must govern, when called for, over

artificial lines. The map does not govern in the measurement of the land.

By the terms of the grant, there is an open boundary on the northeast; as it is specified to be bounded by the Pueblo lands, the two leagues should have been surveyed within the known and marked boundaries towards the southwest, and the Sierra Azul, leaving the line still open on the northeast. For the general law on the subject of boundaries, see 4 Wheat. 444; 3 Pet. 96; 6 Pet. 498; Payne's, C. C. R. 494; 4 Kent, 466, and note, 467.

The counsel also contended that the title of defendant was good; but the view taken by the Court renders any report of this part of the argument unnecessary.

HEYDENFELDT, Justice, delivered the opinion of the Court, with whom ANDERSON, Justice, concurred.

This was an action of ejectment for lands in Santa Clara County. The plaintiffs derive title from Augustin Narvaez, who derives from a grant of the Mexican Governor Micheltoreno, which is in the following words:

"[L. S.] Seal. Provided temporarily by the Maritime Custom House of the port of Monterey in the Department of the Californias for the years 1844 and 1845.

[Signed]

MICHELTORENO.

PABLO DE LA GUERRA.

[36] * "The citizen Manuel Micheltoreno, Brigadier-General of the Mexican Army, Adjutant-General of the Staff of the same, Governor, Commandante of the Staff and Inspector of the Department of the Californias:

"Whereas the citizen Augustin Narvaez has solicited for his personal benefit, and that of his family, two leagues within the land named San Juan Baptista, bounded by the farms of the Messrs. Bernales and Justo Larios with the mountains, with the place of the Hernandez and the town of San José, without passing the grove of sycamore trees, which belong to it (the Pueblo,) after having previously made the examinations and taken the steps according to the laws and regulations in the exercise of the facilities with which I am invested

in the name of the Mexican Nation, I have determined to concede to him the land mentioned, declaring to him the ownership thereof by the present letter, subjecting himself to the approbation of the most excellent Departmental Assembly, and under the following conditions:

"1. He shall not alienate, or hypothecate it, impose any tax upon it, entail it, nor give it in security, nor place incumbrance upon it.

"2. He may fence it without prejudice to the public roads and public uses: he shall enjoy it freely and exclusively, destining it to the use or cultivation which may be most convenient to him; but within one year he shall build a house, which shall be inhabited.

"3. He shall solicit from the respective Judge to give him the juridical possession in virtue of this dispatch, by which the lines shall be marked out, on whose limit he shall place, besides the landmarks, some fruit or forest trees of some utility.

"4. The land of which donation is made is of two leagues, a little more or less, according as is explained by the respective diagram; the Judge who should give the possession shall cause it to be measured according to ordinances; the overplus that shall result from that measurement remaining to the nation for its convenient uses.

"5. If he should contravene the conditions, he shall lose his right to the land, and it shall be denounceable by another. In consequence, I command that these presents shall serve him as *a title, holding it as firm and valid, and [37] an account to be taken of it in the corresponding book, that it be delivered to the party interested for his security and other uses.

" Given in Monterey, March 30, 1844.

" MICHELTORENO.

" MANUEL JIMENO, Secretary.

" Registered in the respective book, folio 8.

" JIMENO."

To this grant is attached a diagram or plat, with the following certificate:

"I, the undersigned, Secretary of the Despatch, certify that the diagram which is manifested in the foregoing page is a counterpart of the original, which exists in the office of Secretary of Government, under my charge.

"MANUEL JIMENO, Secretary.

"Monterey, 30th March, 1841."

It was objected to the sufficiency of this grant:

1. That there was no evidence of its approval by the Departmental Assembly of California.
2. That juridical possession was not given by the proper officers.
3. That it was not surveyed according to the terms of the grant by the legally constituted officer.
4. That whilst the quantity granted is but two leagues, there is shown by actual survey to be within the boundaries granted more than three leagues, and that Narvaez has now possession of two leagues.

This grant was made while the country was under the dominion of Mexico, and must be tested by the rules of law which then prevailed, and which authorized its execution. The cession of the country to the United States has worked no change in the legal rights of private persons. By the law of nations they are equally protected without any treaty stipulations; and this principle has been in many cases recognized by the Supreme Court of the United States. In *Mitchell v. The United States*, 9 Pet., the Court says: "By the law of nations, the inhabitants of a ceded [38] *country retain all rights of property." And again:

"A treaty of cession is a grant by one sovereign to another, which transferred nothing to which he had no right of property. By the treaty with Spain, the United States acquired no lands in Florida to which any person had obtained a perfect or an inchoate title." (See also *United States v. Percheman*, 7 Pet.; *Strother v. Lucas*, 12 Pet.)

The power of the governors of Mexican territories to grant land is derived from the Congressional Decree of 1824, and

the pursuant regulations of 1828. (See Rockwell's Spanish and Mexican Law, 451.)

The 4th of the regulations of 1828 is the one on which the first objection to the present grant rests. It declares: "That grants made to families or private persons shall not be held to be definitively valid without the previous consent of the territorial deputation, to which end the *expedientes* shall be forwarded to it."

By the *expedientes* is meant all the papers or documents constituting the grant or title.

The 8th regulation declares: "The definitive grant asked for being made, a document signed by the governor shall be given to serve as a title to the party interested," etc.

By a proper construction of these regulations, it appears that it was the duty of the governor to make the grant, and then to forward it to the territorial deputation for their sanction, and that being obtained, to deliver it to the grantee as his evidence of title. The identity of language used in the 5th and 8th regulations seems to establish this view beyond dispute. In the 5th are the words "shall not be held *definitively valid*," while the 8th says "the definitive grant being made."

It, therefore, seems clearly to follow that, until the approval of the territorial deputation, the governor could not deliver to the petitioner the document which was to serve him as a title.

It is a familiar principle of law that every officer is presumed to have done his duty, and not to have exceeded the limit of his authority, and this principle has been recognized by the highest court of the United States in reference to the same subject now under review, the grant of lands by governors of foreign territory.

*In the case of *Arredondo v. The United States*, [39] they say that a grant made by a governor is *prima facie* evidence that his power was not exceeded.

If, then, as I have shown, the governor had no right to deliver the grantee his title until it became definitively valid by the sanction of the territorial deputation, and if, as appears here, the title was delivered, then the presumption arises that

the governor fulfilled his duty, and, consequently, that the grant had the approbation of the legislature; and until the contrary is shown by proof, the rules of law imperatively establish this conclusion.

Nor can this view be in any degree weakened because in the deed is found the language "subjecting himself to the approbation of the most excellent Departmental Assembly."

The insertion of these words was proper to show that the grant was made in conformity to the regulations in that respect. It was also an evidence of deference to the will of the legislature, dictated doubtless by official courtesy, which had established it as a formality. It will certainly not be contended that after the action of the deputation the words should have been erased; and a new grant could not be issued, because it was the grant itself (*expediente*) which had to be submitted for their approval.

I deem it proper, as connected with this view of the subject, to refer to notoribus facts constituting a part of the history of the country. Before its conquest by the United States its condition was semi-civilized; its population was sparse, and composed mostly of the inferior and illiterate races, and proper notions of parliamentary usages prevailed but to a small extent, if to any at all. It appears at one time that for a period of more than two years no journal was made of the proceedings of the territorial deputation; at various other times there were similar omissions; and for those periods in which the journals were made, the records of them which are preserved disclose the evidences of great loss and destruction. It would therefore seem that in probably a large majority of cases it would be impossible for grantees to prove the action of the legislature in relation to their respective grants.

This state of facts exemplifies the wisdom of the rule of law, which in this case presumes that the highest officer
[40] of the govern-*ment of this department did not exceed his authority or transcend the limits of his duty. But suppose, as is assumed on the side of the defendant, it was the duty of Narvaez to submit his grant, and obtain by his own action the approval of the departmental assembly, it

would then result that as the power to grant was alone vested in the governor, and as he had exercised his power and made the grant, the necessity of obtaining legislative approval was a condition subsequent to the grant; and this I will treat, together with the other subsequent conditions, the non-performance of which is complained of, to wit, the want of judicial possession and the want of a survey.

Many cases have been decided by the Supreme Court of the United States involving the same question, arising in cases of grants made in Florida and Louisiana. There is, however, no case which I have seen where the grant has been rejected for the non-performance of the conditions, except when a time had been limited in the grant for the performance of the condition and it had never been performed. This was the case in *United States v. Mills' Heir*, 12 Pet.; *United States v. Kingley*, 12 Pet.; *United States v. Drummond*, 13 Pet.; *United States v. Burgevin*, 13 Pet.; *United States v. Wiggins*, 14 Pet. While in the case of *Arredondo*, where no time was limited, it was confirmed, notwithstanding the non-performance. The Court say: "We now consider the conditions upon which the grants were made: there can be no doubt that they are subsequent. The grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions." "No time was fixed for the completion of the establishment. It is an established rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single."

The very same language, with but little alteration, might be applied to this case. No time was limited for the performance of the conditions, and the day before the country was ceded to the United States, the right of *Narvaez* to fulfil the conditions was undisturbed and complete.

It may be said that when no time for performance is fixed, the law will intend a reasonable time; but even if that be conceded, *here was a method pointed out by which [41] it should be determined; in the language of the grant, "it shall be denounced by another."

Then it follows that even if a reasonable time had elapsed, the denouncement by another, or some other action of the government to enforce a forfeiture, would be the only actual limitation as to time. There was no denouncement, and no complaint by the government. On the contrary, stipulating solemnly for his protection and enjoyment of his property, she cedes the country to another government, and thus, by her own act, puts it for ever beyond his power to fulfil the conditions of his grant.

Blackstone, speaking of conditional grants, says: "These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant." (2 Black. 157.)

The same doctrine, I have already shown, was held in the Arredondo case.

Testing the objections which are under consideration by these decisive authorities, they must unquestionably fall.

The next question to be considered relates to the fact that the boundaries of the grant contain more than three leagues, while the grant was only for two. It is argued that until the juridical survey directed by the terms of the grant was performed, so as to set apart specifically the quantity granted, there was no segregation of it from the public domain, and various decisions of the Supreme Court of the United States are cited in support of this position.

I have carefully examined those cases, but I find none which conforms to this.

Here the land is described by specific boundaries, and the deed, accompanied by a diagram, or plat, which it expressly mentions as descriptive; and then uses the most distinct terms of conveyance or grant of "the land mentioned."

In the cases referred to, there is in fact no description of the land, no boundaries, no point of commencement for a survey.

[42] *The case of Wherry v. United States, 10 Pet., was

a grant for "1600 arpents of land near the Rivers Dardennes and Mississippi, in the vacant lands of the king."

The case of John Smith, *T. v. United States*, was a grant of "10,000 arpents, with permission to locate in separate places," anywhere that was suitable to the grantee.

Buyck *v. The United States*, 15 Pet., was for "lands at Musqueto, south and north of said place."

O'Hara *v. The United States*, 15 Pet., was a grant for "land in the District of Nassau."

United States v. Delespine, 15 Pet., was a grant for "land at New River."

United States v. Miranda, 16 Pet., was a grant for "eight leagues square on the waters of Hillsborough and Tampa Bays."

Equally uncertain and indefinite are the grants in the cases of *United States v. Boisdore*, 11 How. 63; *United States v. Lawton*, 5 How. 10; *Lecompte v. United States*, 11 How. In all of these cases, and in many others, no land is pointed out by the grant as subject to individual ownership, and there was in fact no separation of any portion from the public lands. In some of them, also, as in *LesBois v. Bramell*, 4 How. 449; *Blanc v. Lafayette*, 11 How. 101; *Lecompte v. United States*, 11 How.; and *Menard's Heirs v. Massey*, 8 How., there was no actual grant, or no terms of grant, and therefore they were held to have no standing in court, whilst in the *Arredondo* case, which was a case of actual grant, it was held that want of survey did not interfere with the title of the grantee. (13 Pet. 133.)

In the case under consideration, the land was sufficiently defined by boundaries, so that in order to find the land there was no necessity for a survey, the description being clear enough without it. The only apparent necessity for a survey was to ascertain if the granted lands contained more than the quantity intended to be conveyed, and if so, to return the surplus to the public domain. That object might be accomplished at any future time, and it would be unreasonable to say that the delay had forfeited the grant, when the government is still not precluded from an official admeasurement which will secure her rights.

The same question arose in the case of Taylor & Quarle v. *Brown, 5 Cranch. 234. Chief Justice MARSHALL says: "The fifth objection made by the defendant is, that the patent of the plaintiff contains surplus land; the warrant, it is said, was an authority to survey only two thousand acres, and for the surplus the survey was made without authority. It is a fact of universal notoriety in Virginia, not only that the old military surveys, but that the patents of that country generally, contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact and provides for the case. It prescribes the manner in which the surplus may be acquired by other persons, and it is worthy of notice that the patentee must himself reject the surplus before it can be acquired by another.

"The survey is an appropriation of a certain quantity of lands by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government receives his plot and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the government to be an appropriation of the land it covers; and it is difficult to discern a rule by which the survey could be reduced on a caveat by the owner of an interfering survey, unless the entry of it was in such terms that the excess might be considered as surveyed contrary to location, for to every and to each part of the land surveyed its owner has an equal right.

"In conformity with this opinion is that of the Judges of Kentucky. Not a case exists, so far as the Court is informed, in which on a caveat the quantity of land in the survey has been considered as affecting the title upon the single principle of surplus, yet the fact must have often occurred." (See also the case of Johnson v. Buffington, 2 Wash. 116, and Holmes v. Trout, 7 Pet. 171.)

The remarks of Judge MARSHALL above quoted may very well be applied to this case; and there would be a strict analogy by using the word "grant" instead of "survey." It follows that until the proper proceeding is adopted to restore the surplus to the public domain, that "to every and to each part of the land granted, its owner has an equal right."

*It is natural to suppose that the applicants for [44] grants, like the mass of mankind, were but indifferent judges of the quantity of land contained within the limits of natural boundaries. In asking for a specific piece of land, they must have only guessed at the quantity.

The governor, in making the grant, must have been still more incapable of determining if the right quantity was represented in the petition; hence, although guarding against mistake or imposition by directing the survey and measurement, he acted upon the presumption that the representation as to quantity was correct, and made a positive grant of the entire tract contained within the specified boundaries, at the same time providing for the return or reservation to the government of the surplus, if any, when it should be ascertained in the mode pointed out.

It was therefore already a grant of title to the whole, with a defeasance as to the surplus.

If the grantee neglected any of the directions imposed by the terms of the grant, there is no doubt that his land might have been denounced and granted to another, or probably by some other proceeding forfeited to the government. But as long as there was no denouncement and no forfeiture, as long as the government did not complain of his inaction or neglect, or limit the performance of the conditions within any given time, so long did his right to the whole remain perfect and complete against the whole world. No third person had the right to come in and determine that his possession contained more than the quantity granted, because, as I have shown, the presumption was otherwise when the grant was made, and if the presumption was contrary to the fact, the fact itself was only to be ascertained in a judicial survey by the officer of the government. Until then it was never legally determined, and there was no surplus.

This view is strengthened by the consideration that no harm could accrue to the Mexican government by such a construction. Land in this department, at that time, was an object of but little care and less value. It was granted to her citizens and to foreigners freely and without stint. No one needed to have trespassed upon or denounced the pos-

session of another, because his own demands could [45] meet with abundant supply from the *extensive ungranted domain of the Republic; and even if the government had deemed it of importance that the public lands contained in the surplus of the various grants should be severed from the granted land, she might easily have enforced such partition by directing an immediate survey, or by forcing a forfeiture for the want of it.

On the other hand, if it was allowed (when the government did not complain) to any individual to enter upon the granted land and decide for himself that there was a surplus within the granted boundaries, to which the grantee was not entitled, it may readily be seen that by a combination of two or more of such trespassers, the grantee might be deprived of all his land; for if one was allowed to resist his right on the ground of surplus, so might each one of many, after entering, contend and insist that he alone held and claimed the surplus; and thus the party who is the real donee of the government, and upon whom she designed to bestow her favors, would be stripped of his possessions for the benefit of others for whom no such provision was intended.

I now come to the consideration of the defendant's title. He claims by virtue of a grant from an Alcalde of San José. The regularity of this grant is assailed on various grounds, but the view I have taken renders it unnecessary to consider them. To sustain this grant, it was necessary in the first place that the lands in dispute had been the property of the town of San José. No title was exhibited establishing this fact, and the only evidence in relation to it was derived from reputation as to the boundaries of the town. Hearsay evidence is for the most part allowed in matters of general or public interest. It has been a matter of much dispute whether it should ever be received to affect a private right. But even by those Judges who have favored its admission, it was always considered as only auxiliary to other evidence which had laid the foundation of the right. (*Doe v. Thomas*, 14 East, 323; *Morewood v. Wood*, 4 Term, 157.)

Even in regard to boundaries of parishes and towns, it is only received where such boundary is of remote antiquity.

If it was admissible in this case, I look upon that disclosed by the record as too feeble and unsupported to have any weight in the decision *of the right which is con- [46] tended for. Besides this, the land is contained in the grant from Governor Micheltoreno to Narvaez. The power of the Mexican government, as I have before shown, was derived from the Decree of 1824, and by the second section of that decree, the lands belonging to a town are expressly excluded. It appears, therefore, that the governor had no right to grant the lands of a Pueblo, and the presumption of law is that he did not do so, unless the facts show affirmatively and clearly that he exceeded his authority.

From the review we have made of this case, we are satisfied that the District Court erred in its decisions and directions. The judgment is therefore reversed, with the costs, and the case remanded.

It is proper, before closing this opinion, to remark, that in the case of *Leese v. Clarke*, ante 17, decided at this term, the doctrines in that opinion are different from those advanced in this.

Mr. Justice ANDERSON, who united with the Chief Justice in deciding that case, entered a special concurrence as to the judgment rendered, thus reserving himself as to the doctrines laid down in the opinion. He concurs in the principles here maintained, and which, therefore, upon the subjects embraced, must be considered the opinion of the Court.

JANUARY TERM, 1853.

CAL. REPTS., VOL. III.—2



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT,
JANUARY TERM, 1853.

**CLARKSON & VANDERSLICE, Appellants, v. JULIAN
HANKS, Defendant.**

MEXICAN GRANT, PROOF OF.—The grant bears upon its face the condition, that the grantee shall subject himself to the confirmation of the territorial legislature. The acts of a legislative body are susceptible of proof, either by records or parol proof, and cannot be presumed.

IDEM, WHAT NECESSARY TO VALIDITY OF.—By the language of the "Instructions of 1821," the grant asked for shall not be definitively valid, without the previous consent of the territorial deputation, and the *expedientes* shall be forwarded to it."

IDEM, CONDITIONS TO BE COMPLIED WITH.—These conditions must be complied with to vest in the grantee a complete legal title, without which an ejectment will not lie.

TREATY, SOVEREIGN RIGHTS UNDER.—The rights of Mexico passed to the United States, and Congress, in the exercise of its political power, has control over Mexican grants, in cases where the absolute fee has not been passed to the grantee, and for their protection the United States has pledged her faith by solemn treaty.

APPEAL from the Third Judicial District, see page 27, ante.

¹ Commented on, *Pueblo Lands*, *Welch v. Sullivan*, 8 Cal. 198. Conditional grant subject to be defeated till approved, *Ferris v. Coover*, 10 Cal. 616; *Tobin v. Walkinshaw*, *McAll.* 164; that ejectment will not lie, overruled, *Id.* 621; case cited as overruled, *Hart v. Burnett*, 15 Cal. 606.

In the above cause, decided at the October Term, 1852, a petition was filed, and motion made for a rehearing, which having been considered by the Court at this term, the following opinion was delivered by WELLS, Justice, with which MURRAY, Chief Justice, concurred, and ordered a rehearing accordingly.

WELLS, Justice. The above cause was argued before two of the Justices of the Supreme Court, in the absence of the Chief Justice, at the last term, and a decision rendered in favor of the appellants. At the same term of the court at which the above cause was determined, and a short time previous thereto, a decision was announced from the bench by the Chief Justice, in the case of Leese and Valejo v. [48] Clarke, ante 17, (in which judgment one of his *associates concurred,) wherein principles were laid down and maintained as correct, which are directly in conflict with the principles advanced in the decision given in the present case, being diametrically opposed. One or the other of the opinions must be erroneous, and both ought not to remain in their present condition, neither having received the sanction of, or been heard before, a full bench. From these considerations, and in view of the vast magnitude and importance of the interests depending upon a final and early determination and settlement of the questions involved therein, the petition of the respondent should, in my judgment, be granted, and a rehearing ordered herein, to be had before a full Court.

The cause having been reheard, in pursuance of the foregoing opinion and order, the opinion of the Court was delivered as follows, by MURRAY, Chief Justice, with which WELLS, Justice, concurred.

MURRAY, Ch. Justice. Upon the decision of the case of Leese and Valejo v. Clarke, I fully considered the principles which govern this cause. Notwithstanding the lights which have been brought to bear, and the ability of the learned counsel for the respondents, I see no good reason to change my opinion as then expressed. I am aware that the prin-

ciples involved are important, and that no case has ever been passed upon by this tribunal which so distinctly affects the prosperity of this State. At the same time, I am fully satisfied, not only that the conclusions of law at which I arrived are sound, but also that a different rule of decision would be disastrous to the best interests of the State, and iniquitous, unjust, and inequitable in its operation.

I am of opinion that the grant on which the present suit is brought conveys but an inchoate title, and that ejectment cannot be maintained upon it.

If the plaintiffs have any equitable rights in the premises, those rights will doubtless be respected and confirmed by the United States.

The grant in this case bears upon its very face the condition that the grantee shall subject himself to the confirmation of the *territorial legislature: how, then, can [49] it properly be said that such confirmation is to be presumed? The acts of a legislative body are susceptible of proof either by the written records and journals, or by parol, and if the grant in question had ever been confirmed, it would doubtless be in the power of the plaintiffs to prove it. By the language of the Instructions of 1828, "the grant asked for shall not be definitively valid without the previous consent of the territorial deputation, to which end the *expedientes* shall be forwarded to it."

I am ignorant of any process of reasoning, by which a Court could arrive at the conclusion, that a grant had been confirmed in the absence of all proof of the fact, and that too, when it bears on its face, the condition that the grantee should subject himself to such confirmation. To my mind these conditions must be complied with, in order to vest in the grantee a complete legal title, without which, under the rule of the common law, which is the the rule of our decision, an action of ejectment will not lie. I do not pretend that a grant like the present, does not convey any right to the grantee, but only that it does not convey an absolute title. Such grants never were perfect under the Mexican law: the absolute fee never parted from the government. That right has passed to the United States, and she, in the exercise of her political

power, has established a board of commissioners, whose duties are in the nature of an inquest of office to determine these titles, and settle these rights, for the protection of which she has pledged her faith by solemn treaty. Suppose, for the sake of illustration, the plaintiff should recover in this suit, and eject the defendant from the possession of a valuable tract of land, recovering the improvements, and a large amount of damages, or mesne profits, and the Board of Land Commissioners, and the Supreme Court of the United States should afterwards reject the plaintiff's grant, refuse to confirm it, and declare the title to be in the United States, what reparation could be made to the defendant for his loss of property? It is doubtful whether he could maintain any action in the courts of the State, and even if he could, the plaintiff might be wholly unable to respond to him in damages. Such

must be the result in many cases, if the Court should [50] sustain the doctrine contended for, and *would result in a plain violation of the principles both of law and equity. Besides, there are many other essentials wanting to render the title in this case complete. Whenever Congress shall have interposed, and by an act of political power confirmed these grants, then, and not until then, will they have any standing in court.

Judge WELLS, who agrees with me in the conclusions to which I have arrived, will, at his earliest convenience, render his opinion in this case in writing, and give the reasons which lead him to concur in this decision.

The judgment of the District Court is therefore affirmed, with costs.

**BURGOYNE & CO., Respondents, v. PERRY & HOLMES,
Appellants.**

APPEAL, WHEN IT LIES.—Under the act regulating appeals, passed 26th April, 1851, an appeal lies from every order and decision of an inferior court, which *affects a substantial right*.

IDEM TO DEMURRER.—An appeal to a demurrer for want of proper parties, is therefore good where it is determined by the Court that a substantial right is affected by the omission to join such party.

APPEAL from the Fourth Judicial District.

The complaint sets forth that the plaintiffs had recovered judgment in this court against Edward Laffier, for \$2800, on the 16th March, 1852, subject to certain credits. That Langley and others recovered judgment against the said Laffier, on the 15th September, 1851, for \$4302 22, which was assigned to plaintiffs, subject to certain credits specified. That plaintiffs issued executions on said judgments against Laffier, and took proceedings under the statute supplementary to executions, to subject the property of Laffier, in the hands of said Perry and Holmes, the defendants, to the payment of the balance due on the said judgments. On their examination, Perry deposed that he had county bonds, received from Holmes, to the amount of \$21,000; that \$18,000 were from Mr. Young, and \$3000 from Holmes; that *\$6180 [51] were due on these bonds, which he, Perry, had paid to Young. Holmes had paid about \$5000 on account, and that there is now due to affiant from Holmes about \$5000, for which he holds these \$21,000 of bonds as collateral; and gave a schedule of the bonds.

Holmes deposed that Laffier had pledged, in the hands of Dr. H. S. Gates, \$20,000 of bonds or scrip of the County of San Francisco, on which he had borrowed \$6000. That J. Perry, Jr., had called upon Gates, about the 27th December, 1851, and received the \$20,000 of bonds, and paid \$6036 for their redemption, and then hypothecated them to Young, for the same amount; and a few days since they were taken up and redeemed for affiant by J. Perry, Jr., who now holds them. Had also redeemed from Edwards, three bonds,

amounting to \$1500, which had been hypothecated by Laffier, for \$1560, which sum affiant paid, he being endorsed on the note. Affiant acted as attorney in fact for Laffier during his absence from the State, but has ceased so to act since Laffier's property had been sold out. No money has come into his hands as attorney in fact, except \$100. Has in his hands a judgment belonging to Laffier, against one Potts, for \$1000, and is the collector of the rents on land sold by Laffier to the County of San Francisco, for which the scrip was given. As collector, received \$200 a month for five months, which he has credited to the interest of the said stock and scrip.

On the coming in of the said answers, the plaintiffs took a rule on defendants, to show cause why the said bonds and scrip should not be made subject to the executions aforesaid, and delivered to the plaintiffs, and sold in satisfaction of said judgments, etc. When the said Holmes and Perry asserted the ownership of said Holmes to the \$21,000 of county bonds, and Perry claimed an interest in them as pledgee of said Holmes, and therefore the Court ordered that the "plaintiffs do institute suit to recover and subject the interest of said Laffier, in said bonds and scrip in the hands of Holmes and Perry, to the payment and satisfaction of their said judgment, and executions issued thereon."

The complainant, then, "in obedience to the said order," proceeds, and avers the truth to be, that Laffier being [52] the owner of *the said bonds and scrip, pledged them to Gates; that Holmes availed himself of the relation of agent for Laffier, to redeem them, Perry paying, in order to effect the redemption thereof, to the said Gates, \$6036; and to raise this sum, Holmes, through Perry, pledged the same bonds in scrip to Young. That Holmes, through Perry, redeemed them from Young, and pledged them to Perry to secure advances thereon. That Perry, in all these transactions, was cognizant of the relation of general agent and attorney in fact existing between Laffier and Holmes, and could not acquire an interest adverse to Laffier, who is the true owner, subject to the amount paid to Gates, which plaintiffs had offered to reimburse with interest from the time of

the redemption, on the bonds being placed in the hands of the sheriff, subject to plaintiffs' execution, which offer was declined; and plaintiffs now offer to pay the same into Court, and pray the Court to pass an order forbidding any transfer, or other disposition of said bonds or scrip, pending this action, and for their delivery to the sheriff, to be sold on the plaintiffs' executions, as the property of said Laffier, and for further relief, etc.

On the 11th June, 1852, the Court made an order "that the defendants, John Perry, Jr., and Isaac E. Holmes, do refrain from selling, or in any way disposing of the county bonds, or scrip, mentioned and described in this complaint, until the further order of this Court."

On the 6th July, 1852: "The defendants demur to the complaint; assigning for cause: 1st. That it appears on the face of the complaint that Edward Laffier is a necessary and proper party to this action, yet that he is not made a party thereto."

(There are other reasons assigned, which were not considered by the Supreme Court.)

July 29th. The Court ordered judgment for plaintiffs, on the demurrer, with leave to defendants to answer in five days.

August 9th. Defendants appealed from this order.

It will appear from the opinion of the Court that this cause was dismissed at a former hearing. But upon motion to reconsider the order, a rehearing was granted, upon which it now comes again before the Court. The ground of the first decision in dismissing the case, was, that the appeal had been taken upon *an interlocutory order, and [53] could not therefore be entertained by the Court. The rehearing was urged by appellants' counsel, upon the ground that the decision appealed from *is an order affecting a substantial right*, and is a proper subject for an appeal, under the 347 sec. of the Practice Act. Rehearing ordered January 4th, 1853.

James, Noyes, and Barber, for Appellants.

Hastings, Thomas, and Morse, for Respondents.

For appellants it was urged that Laffier was a necessary party defendant in the suit. (Prac. Act, secs. 13, 243, 238, 242; Story's Eq. Plead., secs. 136, 7, 8, 193 (2), 207, 208, § 64; 1 Danl. 200, 227.)

The complaint does not show that the bonds are the property of Laffier, but that as *cestui que trust* he has a right to elect to take them or not. (Story, Eq. Juris., § 321, 2; 2 Con. R. 236; 2 Caine's Ca. 194; 2 Paige, 180; 5 Johns, 43, 48.)

A suit can only be sustained, under the 244th sec. of the Practice Act, where the third party holds *property* of the judgment debtor, or is indebted to him; and it is not claimed that Holmes is indebted to Laffier, nor does it appear that the bonds are yet or ever will be Laffier's property.

If plaintiffs are subrogated to the rights of Laffier, they cannot maintain this action, which is for the recovery of property, except under circumstances which would entitle Laffier to maintain it. (See Pr. Act, § 244.)

To recover from Holmes, Laffier would have to prove that the property was wrongfully withheld from him. So Laffier's creditors must prove that Holmes's detention of the property, as against Laffier, is wrongful. For the complaint shows that Holmes holds the property as Laffier's agent; and the presumption is that he holds it lawfully, till the contrary is proved.

For respondents it was argued that Laffier was not a necessary party. Plaintiffs had judgment against him, had issued execution, and had taken proceedings against his funds in defendants' hands, when Holmes asserted ownership, and

Perry, that he held the assets as pledgee of Holmes; [54] whereupon the Court *ordered suit to test the right of property. (Pr. Act, 1851, pp. 90, 91; secs. 241, 3, 4.)

There is under the statute no place for Laffier in this action. The plaintiffs represent his interest and do not require him. If a party, he could not recognize the ownership in Holmes, because the demurrer admits it to be in Laffier. If he could do this under the proceedings had in the case, he could do it as well without being made a party.

We admit the action is brought under the 244th sec. of the

Practice Act of 1851. The question of property, whether in Holmes or in Laffier, is the only one in the case.

The opinion of the Court was delivered by MURRAY, Chief Justice, with whom WELLS, Justice, concurred.

This is an appeal from the judgment of the Court below overruling a demurrer. Upon the first argument of this cause, this Court dismissed the case, on the ground that an appeal would not lie from an interlocutory decree or order. This opinion was evidently made without due consideration of our statute, and the Court was doubtless impelled to the conclusion to which they arrived by their knowledge of the practice in other States. We admit without any hesitation that the statute giving an appeal from interlocutory decrees, and orders of inferior Courts, is not in consonance with our opinions of correct practice. Yet a single glance at the act regulating appeals, passed April 26th, 1851, is conclusive upon this Court, and shows that the legislature evidently intended, and have so expressed, that an appeal should lie from every order and decree of the Court below, which affects a substantial right. Not only is this evident from the language of the statute itself, but the provision of the Practice Act, dividing the terms of this court, and the District Court, into general and special terms, and giving to this court jurisdiction of such appeals at special terms, is conclusive, even were the statute doubtful, which we do not conceive it to be.

It may in some cases be difficult to determine whether the order affects a substantial right (in the language of the statute); but when the Court has determined that such right is affected, then the right of appeal clearly attaches.

*We are of opinion that the demurrer was well taken [55] in the Court below, and that Laffier is a necessary party to the adjustment of the present controversy, and should have been joined as a co-defendant.

The former judgment of this Court, for the reasons above stated, is overruled. and the judgment of the Court below is reversed, with costs; but giving to the respondent leave to amend his complaint, by making Laffier a party defendant to the suit.

GEORGE BARTLETT, Appellant, v. A. P. HOGDEN,
Respondent.

¹ **NEW TRIAL, NEWLY-DISCOVERED EVIDENCE, SHOWING REQUIRED.**—An application for a new trial on the ground of newly-discovered evidence, must show affirmatively that the evidence is new, material, and not cumulative; that the applicant has used due diligence in preparing his case for trial; that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not directly in issue on the trial, or were not then known or investigated by proof.

DAMAGES, REVIEW ON APPEAL.—The amount of damages is simply a question of fact within the province of the jury. This Court will not undertake to examine the proofs, or declare that the evidence was insufficient to justify the verdict.

APPEAL, ERROR MUST APPEAR.—The appellate court will not disturb the order of an inferior court in granting or refusing a new trial, unless manifest error shall appear.

APPEAL from the Tenth Judicial District.

The plaintiff in this suit claimed damages from the defendant for the *detention* of certain personal property, specified in the complaint as of the value of \$2000, which plaintiff averred belonged to him, and not to defendant, and the possession of which he had demanded of defendant, who had refused to deliver it; and prays for judgment, that the property be restored to plaintiff's possession, and for damages for the detention, etc., and for further relief, etc.

The defendant for answer says, that the allegations in the complaint are not true; upon which issue was joined.

The cause was tried by a jury at August Term, 1852, who found for plaintiff \$975, with interest and costs, for [56] which *judgment was rendered accordingly, amounting in the whole to \$1256 80.

Defendant moved for a new trial, on the ground: 1st. Of newly-discovered evidence. 2d. Excessive damages. 3d. Want of sufficient evidence to justify the verdict.

Defendant's affidavit, filed on the above motion, stated that

¹ Cited, *Brooks v. Lyon*, post 114; *Klockenbaum v. Pierson*, 22 Cal. 163. See *Burritt v. Gibson*, post 399; *Taylor v. Cal. Stage Co.*, 6 Cal. 228; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Berry & Metzler*, Id. 418; *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Baker v. Joseph*, 16 Cal. 173; *Spencer v. Doane*, 23 Cal. 420; *Rodriguez v. Comstock*, 24 Cal. 89; *Aldrich v. Palmer*, Id. 513; *Schellhous v. Ball*, 29 Cal. 609; *Arnold v. Skaggs*, 35 Cal. 684.

since the trial he had discovered evidence to show a sale of the property sued for, from the plaintiff to Shephard, from whom the defendant purchased it, and filed the affidavit of A. L. Merriam, dated 27th August, 1852, who deposed that the plaintiff admitted to him, in the latter part of 1850, or beginning of 1851, that he had sold the property to one D. M. Shephard.

There is also another affidavit in the record filed by plaintiff, of the same witness, A. L. Merriam, dated 6th September, 1852, in which he deposes that what he had stated in the preceding affidavit, as knowing from plaintiff, he had informed the defendant of, a long time previous to the trial of this cause, and that said Bartlett knew the same by information from him.

It was urged by defendant that there was no testimony to justify the verdict, and the evidence taken in the case was referred to. The Court, after argument, overruled the motion, and defendant appealed.

Walker, for Appellant,

Urged that the counter-affidavit of Merriam should not be considered, under the provisions of the Practice Act, sec. 195, which, speaking of motions for new trials, requires that counter-affidavits shall be filed one day at least before hearing, whereas the affidavit in question was filed the day the motion was heard.

A new trial was granted, when it appeared that a witness examined on the first trial could testify as to material facts, and the party applying for it was not aware of the extent of his knowledge at the time of his first examination. (8 Whar. Rep. 489. See also 7 Johns. 306.)

From the statement filed, and depositions referred to, nothing is clearer than that the jury gave excessive damages.

Berry, for Respondent,

Cited Colly's Prac. 330; Morris's Iowa Rep. 398.

Merriam *was sworn as a witness on the trial on the [57] part of defendant, and in his counter-affidavit he swears that he had told Bartlett of the very fact before the

trial, which he now sets up as newly discovered. And as to the objection that this affidavit was not filed in time, it comes too late in this court, and should have been taken below.

It does not appear from anything the appellant has shown, but that the new testimony relied upon was anything more than merely cumulative, or that it would have altered the result of the case if it had been introduced.

The appeal only brings up a part of the case upon which the Judge below acted (the refusal of the new trial,) and appellant can only rely upon his affidavits, and can have no reference to any testimony. The Judge below had matters before him which enabled him to judge of the materiality of the evidence, which this Court have not, and cannot have, from the record sent up. And if the case here is different from that presented to the Court below, this Court cannot review the order of the Court below. The Judge below had knowledge of facts which enabled him to know whether the evidence said to be discovered was cumulative or not; whether appellant had used diligence or not; which respondent says is not before this Court, and therefore this Court cannot, upon the case before it, say, that the Court below decided against the sound discretion required of it.

WELLS, Justice, delivered the opinion of the Court, with which HEYDENFELDT, Justice, concurred.

The grounds on which the motion for a new trial in the court below was based, were, newly discovered evidence, excessive damages, and insufficiency of the evidence to justify the verdict.

An application for a new trial on the ground of newly discovered evidence, should show affirmatively that the evidence is new, material, and not cumulative, that the applicant has been diligent in preparing his case for trial, that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not directly at issue on the trial, or were not then known or investigated by proof. (Daniel v. Daniel, 2 J. J. Marsh. 52. See Graham on New Trial.)

[58] *In the case before us, an affidavit was produced,

on the part of defendant, and sworn to by him, in which he states, "that since the trial of said cause at the August Term of the District Court, he has discovered evidence to show a sale of the property sued for, from Hogden (the plaintiff) to Shepard, from whom defendant purchased it, and the nature of the evidence is shown by an affidavit of A. L. Merriam, who states that Hogden admitted to him, in the latter part of 1850, or beginning of 1851, that he had sold the property sued for in said suit to one D. M. Shephard. The defendant further shows, by his affidavit, that although he had frequently conversed with said Merriam about transactions between Hogden and Shephard, yet said Merriam had never spoken of Hogden's admissions in regard to the property referred to. It appears, also, that Merriam was examined as a witness on the part of the defendant on the trial; thus showing that the defendant had full opportunity, with the exercise of due diligence, both from frequent conversations with the witness upon the subject-matter before the trial, and through his examination upon the stand at the trial, to have ascertained all that the witness knew upon the subject. It was a material fact to show on the application for a new trial, that Merriam had never informed the defendant before the trial of the admissions of the plaintiff; and the defendant ought not to have relied on his own single and unsupported statement, but should have procured the affidavit of Merriam to explain how it was that he concealed a fact so material to the point at issue until after the trial.

Can it be said that the testimony of Merriam as to the admissions of plaintiff would not be cumulative, or that it would tend to prove facts which were not directly in issue on the trial, or were not then known or investigated by proof? We think not. By an examination of the depositions in writing which were used upon the trial, and also used upon the motion in the Court below, we discover that a witness named Springer was examined on the part of the defendant upon the point as to the alleged sale and delivery to Shephard. It then appears that this fact was in issue on the trial, and the same was investigated by proof.

Proof was also adduced upon the trial as to the amount of

damages. This being simply a question of fact, it was [59] entirely *within the province of the jury, and this Court cannot undertake to examine into the proofs, or to declare that there was an insufficiency of evidence to justify the verdict.

Much is necessarily left to the discretion of the Judges in courts below in granting and refusing new trials; and it is a well-settled principle that appellate courts will not disturb the order of an inferior Court on such motions, made in the exercise of that discretion, unless manifest error shall appear. No such error appearing in this case, the judgment must be affirmed.

Ordered accordingly.

JAMES LICK, Appellant, v. HUGH O'DONNELL,
Respondent.

DEED, DESCRIPTION IN.—A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but one lot in the place, is not void for uncertainty in the description.

¹ **CONVEYANCE, WHEN GRANTEE TAKES AS TENANT IN COMMON.**—But if such deed is not void, it can only convey an undivided half of the said lot, and the grantee can only take as tenant in common with the grantor.

TENANTS IN COMMON, RIGHT OF ACTION.—One tenant in common cannot sustain an action of forcible entry and detainer against another, for holding over. He must first resort to a court of equity for a partition of the bond in dispute.

THIS was an action brought before a Justice of the Peace, under the statute of forcible entry and detainer.

The complaint alleged that Lick, the plaintiff, being the owner of a certain piece of land, situated in San Francisco (describing the same,) he leased the same to one Dennis Martin, for four months, at the rent of \$400 per month, and that Hugh O'Donnell, during the said term, entered into the possession of the said premises, and holds the same under the said Dennis Martin, plaintiff, immediate lessee, and, that

¹ Cited, *Schenk v. Evoy*, 24 Cal. 111; *Lawrence v. Ballou*, 37 Cal. 520. See *Jenkins v. Frink*, 30 Cal. 594; *Grogan v. Vache*, 45 Cal. 612.

said Hugh O'Donnell, holding over the said premises after the expiration of the said term, and refusing to pay any rent for the same, plaintiff, by his attorney, made a demand in writing of defendant, to deliver the possession of the premises, etc., which defendant refused for the space of three days, and still refuses, etc. Wherefore, plaintiff prays for restitution, etc., and for judgment against defendant, for rent due, etc., and for damages, and further relief.

*The defendant filed a plea, denying the facts in the [60] complaint, and claiming title to the lot, prayed the cause to be transferred to the District Court, which was transmitted accordingly; and the case being in the said court, the defendant filed his answer, denying all the allegations of the complaint, and denying specially that plaintiff was the owner of the lot, or that he had leased the same to Dennis Martin, as stated, etc., and avers that he holds the same in his own right, and claims to be the owner thereof, and denies holding over of the premises, etc.

At June Term, 1851, defendant filed an amended answer, saying that if ever complainant had title as landlord to the premises, the same had ceased and determined before the commencement of this suit, and that the same was, and still is, vested in defendant.

There was evidence that Dennis Martin (the tenant) had told O'Donnell, the defendant, that he might put a tent on the eastern part of the lot, which he did, placing the tent about four feet on Martin's eastern half, and about sixteen feet on the western half of the said lot. That he leased from Lick, the plaintiff, the western half of the lot (which was a 50 vara lot, No. 34,) and paid \$300 to Lick for the first month's rent, which he collected of Martin's tenants, and paid as agent of Martin. At the end of four months, Martin told O'Donnell to give up possession to Lick, which he said he would do, but did not.

It was admitted on both sides, that the lot was originally granted to Antonio Bujan, previous to 15th May, 1846.

Defendant gave in evidence, a deed, dated 15th April, 1850, from Antonio Bujan, who in consideration of \$400 paid by H. O'Donnell, conveyed to him all his estate, etc., to that

certain lot (describing it,) being the western half of lot No. 34, on the plan of San Francisco, which was recorded August 5th, 1850.

This deed was objected to by the plaintiff's counsel, on the ground that defendant, being the sub-tenant of plaintiff, could not controvert his landlord's title, but must first surrender up to him the demised premises; but was admitted by the Court, and excepted to.

Plaintiff then offered the following deed in evidence, dated May 15th, 1846 (which being in Spanish, the translation was admitted to be correct):

[61] *"I, the undersigned, in presence of the witnesses, and of the Judge of this jurisdiction, do declare that I cede to Senor Francisco Ramirez one-half of my lot. This lot contains 50 varas square, that is to say, my said cession to the said Senor Ramirez is 25 varas square. And in order that he may occupy, possess, and use it as he pleases, as its owner and proprietor, I authenticate and deliver to him this, to serve as security and guarantee for him, at Yerba Buena, May 15th, 1846.

"ANTONIO BUJAN.

"JOSE MARIA SANTA MARIA,

"FRANCISCO DE HARO.

"Before me, I. DE JESUS NOE.

"Recorded in the office of the county of San Francisco, 10th February, 1851."

This deed was objected to, on the ground that it was void, from the vagueness of the description of the premises it purported to convey, and that it had no reference whatever to the land in dispute.

Plaintiff's counsel proposed to connect the deed with the premises by testimony; and its execution being admitted, the Court permitted it to be read, reserving the right to strike it from the testimony in case the connection should not be shown.

Defendant's counsel excepted.

Plaintiff then offered the deposition of Antonio Bujan, to show that, at the time he executed the deed to Lick, he only owned one lot in Yerba Buena, and that that lot was No. 34.

Defendant's counsel objected to the testimony; but the Court admitted it, and defendant excepted.

The deposition was read, the witness deposing that he had at the time of the conveyance, lot No. 34, and that he never owned any other real estate in Yerba Buena; and on cross-examination said, that he had sold one-half of said lot to Dennis Martin, and the other half to Hugh O'Donnell, the defendant, in this suit; and denied that he had sold any of the property referred to, to Francisco Ramirez.

Plaintiff's counsel objected that the witness could not be allowed to contradict his conveyance, and destroy the effect of the same; which the Court sustained, and the defendant excepted.

*The witness further stated, in answer to interrog- [62] atories, that in the latter end of 1846 he had agreed to give Ramirez one-fourth of the lot, on condition that he would fence it agreeably to Mexican law, and build a house on the share witness was to give him; but that he did not fence in the lot nor build according to the condition. The portion to be given him was on the south side of the lot; and other than this, there was no other contract with Ramirez. To the admission of this answer, plaintiff's counsel also excepted.

The witness also said that he had possession of a lot, in 1846, near the Lagoon, and also of a tract in the Mission Dolores, in which he had built a house in 1847. This was said in answer to the interrogatory, whether he had in possession any other real property in said place or its vicinity. The interrogatory and answer were objected to and admitted, and excepted to by plaintiff's counsel.

The case was submitted to a jury, who found for plaintiff damages at \$120 per month, for nineteen months, making an aggregate of \$2280; for which the Court entered judgment.

5th September, 1851. Defendant appealed.

———, for the Appellant.

The deed from Bujan to Ramirez was void, from vagueness of description of the premises it purported to convey, and so as to quantity.

The conveyance was not recorded till 9th June, 1851, and it is not shown that plaintiff held under it.

Both parties claim under the same grantor, and admit that the lot No. 34 was granted to him prior to 15th May, 1846, and he conveyed to defendant, 25th April, 1850, the west half of it. Defendant was tenant of Martin, not of plaintiff. He placed his tent on the lot by Martin's permission as owner, and not as tenant.

There existed no relation between the plaintiff and defendant, that prevented the latter acquiring title. (Act of 1850, p. 252, sec. 34; 1 Comstock, 253; Nelson, Ch. 256, 258.)

Hall McAllister, for Respondent.

The vagueness in the deed was supplied by proof, [63] that the *grantor had but one lot in Yerba Buena, at the time of the conveyance, and *that*, the lot in controversy. (Greenl. Evid., secs. 298, 300, 301, n. p. 392; 4 Mass. 204; 13 East, 9 (20,) 2 N. S. Dig. 49, sec. 548.)

Under Mexican law, a consideration is not essential to the validity of a deed. "A donation between living persons, is *perfected* by the consent of the donor, and the acceptance of the donee." (5 Partides, Title 4, Law 8.)

A grantor cannot be allowed to disaffirm his own act, in executing a conveyance: he may prove that it was obtained by fraud or misrepresentation, but cannot contradict it. (1 Mass. 69; 1 Day, 19.)

Other points made by counsel in the case, were not considered by the Court.

The opinion of the Court was delivered by MURRAY, Chief Justice.

This was an action, commenced under the statute concerning forcible entries and unlawful detainers, and transferred to the District Court, upon an affidavit of title. There is no evidence in the record showing that O'Donnell entered into possession under Lick.

The deed from Bujan to Ramirez, under whom Lick claims, calls for "one-half of my lot." Parol evidence was admitted in the court below, to prove that, at the time Bujan executed

said deed, he owned but one lot in San Francisco, viz., lot 34. Admitting this deed is not void for uncertainty, it can only convey an undivided half of said lot. The exact portion conveyed is not set forth by any metes or bounds, by means of which it can be separated or distinguished from the remainder. It therefore follows that Ramirez took as tenant in common with Bujan, and Bujan having afterwards sold his remaining interest to O'Donnell, Lick, the present plaintiff, who claims under Ramirez from Bujan, and O'Donnell, hold as tenants in common, being seised for themselves, and for each other; consequently, this action cannot be maintained against O'Donnell.

Before the plaintiff can obtain any relief, he must resort to a court of equity, for a partition of the land in dispute.

Judgment reversed, with costs.

***CHARLES G. MOXLEY and JOHN S. MOXLEY, [64]**
Respondents, *v.* DANIEL M. SHEPARD, and
GARWOOD & LEEDS, Appellants.

MECHANIC'S LIEN, STATUTE CONSTRUED.—The statute of April 12th, 1850, "To provide for the lien of mechanics and others," has placed liens for *materials*, and liens for *labor*, on the same footing; and it is error in the Court to refuse to distribute the proceeds in conformity to the statute.

APPEAL from the Eighth Judicial District, Yuba County.

The appellants in the Court below, under the 13th section of the Practice Act, claimed a *pro rata* distribution of the proceeds of a building, sold by the sheriff to satisfy a judgment decreeing a mechanic's lien, upon a claim of Garwood & Leeds. The appellants claimed, also, under a judgment against the building, for *materials* furnished, and their judgment was of the same date with that of the respondents. The Court below rejected the claim of the appellants; who took this appeal.

Walker, for Appellants.

By the 9th sec. of the Mechanic's Lien Law, liens for *labor* and for *materials* are all of equal force; neither has precedence of the other. Such is the law in Pennsylvania, and our statute is very similar to the statute of that State. (5 Wats. 487.) And if their liens are of equal value, the parties are entitled to distribution *pro rata* of the proceeds of sale.

MURRAY, C. J., delivered the opinion of the Court, with which HEYDENFELDT, Justice, concurred.

This was an application, upon the part of the appellants, to the Court below, for a *pro rata* distribution of the proceeds of a building, sold to satisfy a judgment decreeing a mechanic's lien.

The appellants had a judgment against the building, of the same date with that of the respondent, for materials furnished in its construction. Our statute has placed liens for materials and liens for labor on the same footing.

The Court erred in refusing to distribute the proceeds in conformity with the statute.

Judgment reversed, and new trial ordered, with costs.

[65] *WM. S. WEBB v. GEORGE M. HANSON, ELIAS BORTRY, LAFAYETTE McLEON, and others.

FERRY LICENSE, APPEAL FROM ORDER OF COURT OF SESSIONS.—The 21st sec. of the act of March 18th, 1850, gives to any person who shall be aggrieved by the order of the Court of Sessions, granting a license to establish a ferry, the right to appeal from the same to the District Court, on giving bond within thirty days, etc., upon which appeal "*further proceedings shall be had, and judgment rendered thereon, as in other cases of appeal.*"

IDEM, JUDGMENT OF DISTRICT COURT CONCLUSIVE.—No appeal from the decision of the District Court has been provided in such cases by law, and unless the party can bring himself within the constitutional provision, the judgment of the District Court is final and conclusive.

JUDGMENT NOT SUBJECT TO COLLATERAL ATTACK.—When the judgment of the District Court, confirming such license, is unreversed, it cannot be tried collaterally.

APPEAL, WHEN IT DOES NOT LIE.—This Court cannot review such decision of the District Court. Whether its decision, or the appeal from the Court of Sessions, was proper or not, can make no difference: this Court is bound to suppose it was correct.

APPEAL from the Tenth Judicial District, Sutter County.

This action was founded on an injunction bond for \$3000, executed to plaintiff by defendants, as explained below.

The record sets forth that the plaintiff, Webb, applied to the Court of Sessions of Sutter County, at May Term, 1851, for license to establish a ferry across Feather River, above Yuba City, which the Court granted for one year from date, May 21st, 1851, upon payment of \$25, in addition to \$450 before paid; stipulating the rates of toll to be taken by the grantee, and requiring a bond in the sum of \$5000 for the faithful discharge of his duties.

On the 23d of May, 1851, Hanson took an appeal from the order of Sessions granting the above license, to the District Court of said county, which was tried at June Term, 1851, and the order affirmed, and judgment was rendered in favor of the plaintiff. Hanson, then, on the 16th June, took an appeal from the judgment of the District Court, to the Supreme Court; and all these orders and proceedings being in full force, Hanson, on the 21st June, 1851, applied to GORDON N. MOTT, Judge of the Tenth Judicial District, and obtained an order restraining and enjoining Webb from running said ferry, until the appeal *taken from the District [66] Court to the Supreme Court should be decided, but the injunction not to issue till Hanson had filed his bond, with securities in the sum of \$3000, for the payment of any and all damages said Webb might be deemed to suffer by reason of said injunction; which bond, executed by Hanson and the other defendants, as sureties, was filed accordingly on the 21st June, 1851; upon which bond this action is founded. The injunction was issued, and placed in the hands of the sheriff of the county, requiring him to restrain Webb from running the ferry until the appeal above stated should be finally decided, and was served on Webb the 23d June, 1851; by reason of which he avers that he was prevented from the use of the ferry, and deprived of the tolls, etc., from the 23d June, 1851, until the 21st February, 1852, when the Supreme Court decided the case in his favor; by

reason of which he has sustained damage to the amount of \$3000, and claims judgment for the same.

G. M. Hanson for answer denies all the allegations of the complaint, and specially denies that Webb had a legal license to run the ferry, as set out by him, and denies the alleged damage, and calls on plaintiff for proof.

At November Term the cause was submitted to a jury, and after hearing the evidence, the defendant moved the Court for a nonsuit, on the ground that the license had been illegally granted to Webb; which the Court overruled. The cause was then proceeded with, and the jury brought in a verdict for plaintiff for \$3000 and costs; and the Court ordered judgment against Hanson & McLeon for that amount, with costs. And the cause was continued with respect to the other defendants.

The evidence on the part of the plaintiff went to show compliance with the provisions of the act relating to ferry licenses, which was held sufficient by the Court.

That offered by the defendant, and which was overruled by the Court, was designed to show that the terms of the act had not been complied with, and that consequently the license was illegally granted; leaving the question as to the legality of the license the only one for the consideration of the District Court, who affirmed the grant.

And the District Court having so affirmed the license [67] granted *by the Sessions, the inquiry addressed to this Court was, whether they would reverse the decision of the District Court in the premises?

Walker, for Appellant,

Cited the Practice Act, sec. 59. "In pleading a judgment of a court of special jurisdiction, such judgment may be stated to have been duly made. If such allegation be controverted, the party pleading shall be bound to establish the facts confirming jurisdiction. Also, 19 Johns. 33, distinguishing between courts of special and general jurisdiction, the intendment is in favor of the latter, but the former must be shown. (1 Denio, 141; 6 Barb. 607, 621; 1 Wend. 652; 1 Hill, 138.)

The Court of Sessions, being a court of special jurisdiction, could only take jurisdiction of the case when the requirements of the law were complied with.

Did not the District Judge, in reversing the case, act merely as a special, and not as a general court? If this be so, it should have been shown that he did not exceed his jurisdiction in the trial; and if a mere supervisor in the case, he should have decided without devolving questions upon a jury which he alone could properly decide.

Hastings, Shaw, and Wise, for Respondents.

The verdict of a jury is conclusive as to facts, and this Court will not examine into them. This appeal is from a judgment upon a verdict, and if no error in the judgment or ruling of the Court, the judgment must be affirmed. The case of *Wells v. Hanson* governs this case.

It is sufficient for the maintenance of this action that Webb should show *some damage*, and whether it arose under a valid or invalid license, it is immaterial, so that he had a license giving him color of right.

The judgment of the Court of Sessions, affirmed by the District Court, is conclusive as to Webb's right to keep a ferry; and they being courts of record, an inquiry cannot be had behind their judgments, as to the regularity of their proceedings.

MURRAY, Chief Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

*This was an action, commenced in the court below [68] by the respondent, under the second section of the act regulating public ferries, passed April 29th, 1851.

Upon the trial of the cause, the defendant produced a license to run a ferry, granted by the Court of Sessions of Yuba County, which license had been confirmed by the District Court, upon appeal from the decision of the Court of Sessions granting the same. Whereupon the Court below decided that said license was a complete bar to the plaintiff's action, and rendered judgment for the defendant.

The plaintiff offered to show in evidence that the license

under which the defendant justified was void, because the Court of Sessions had exceeded its jurisdiction in granting the same, and that the District Court had erred in affirming the license so granted; which testimony was excluded by the Court.

The act of the legislature, creating and regulating public ferries, passed March 18th, 1850, vests in the County Court of each county, the right to establish and regulate public ferries. The applicant for such privilege is required to file his petition, to pay a certain tax assessed on such license, etc. The 11th section of said act prohibits the Court of Sessions from establishing any ferry, unless the applicant produces satisfactory proof that written notices of his intended application have been posted up in three of the most public places of the township for at least thirty days.

The 21st section of the act provides, that if any person shall feel aggrieved by the order of the Court of Sessions granting such license, he may, on giving bond, within thirty days, etc., appeal from the same to the District Court, upon which "*further proceedings shall be had, and judgment rendered therein, as in other cases of appeal.*"

No appeal from the decision of the District Court has been provided in such cases by law, and unless the party can bring himself within the constitutional provision, the judgment of the District Court is final and conclusive.

The judgment of the District Court confirming the license to the defendant had never been reversed, and the correctness of that decision could not be tried collaterally. It is [69] true the Court of Sessions is a court of limited jurisdiction; and every step which the law requires to be taken by the parties in obtaining such license ought to appear affirmatively. The object of the legislature, however, in giving an appeal to the District Court was for the very purpose of correcting the errors and informalities of the Court of Sessions.

We have no power to review the decision of the District Court in this manner. Whether the decision upon the appeal from the Court of Sessions was proper or not can make no difference: we are bound to suppose it was correct. To

allow the judgment of the District Court to be impeached in the manner proposed by the plaintiff, would open the door to endless delays and difficulties, and it would constantly be called on to review in one case what it had determined in another, thereby destroying its utility, and rendering its judgment inoperative, unstable, and worthless.

Judgment affirmed.

PASCAL SUROCCO et al. v. JOHN W. GEARY.

NUISANCE, RIGHT TO STOP CONFLAGRATION.—A person who tears down or destroys the house of another in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, is not personally liable in an action by the owner of the property destroyed.

NUISANCE, HOUSE ON FIRE CONSTITUTES.—A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate, and the private rights of the individual yield to considerations of general convenience and the interests of society.

CONSTITUTIONAL LAW, COMPENSATION ON CONDEMNATION.—The constitutional provision, that requires payment for private property taken for public use, does not apply in such case. This right belongs to the State, in virtue of her right of eminent domain.

IDEM, PROPERTY WHEN NOT TAKEN FOR PUBLIC USE.—The property thus taken was not a taking for public purposes, but a destruction for individual benefit, or for the city, and not for the State.

TRESPASS, WHEN PARTY LIABLE FOR.—The necessity for such act of destruction must be clearly shown. But in all such cases the individual must be regulated by his own judgment; and if done without actual or apparent necessity, he is liable in trespass.

DAMAGES FOR PROPERTY DESTROYED.—The plaintiff cannot recover for the value of the goods in the house which he might have saved: these are equally liable to the necessities of the occasion with the house in which they are placed.

***APPEAL** from the Superior Court of San Francisco. [70]

This was an action brought in the Superior Court of the city of San Francisco, by the plaintiffs, against the defendant, for the recovery of damages for the blowing up with gunpowder, and destroying their house and store, with the goods therein, on the 24th December, 1849. Damages laid at \$65,000.

The defendant answered, that the said building was, at the time of the entry upon the same and of the destruction thereof, certain to be consumed by a public conflagration then raging in the city of San Francisco, and to communicate the said conflagration to other adjacent buildings in the said city. That defendant was at the time First Alcalde of the said city, and did, by the advice and command of divers members of the then Ayuntamiento, enter into and destroy the said building, as for the cause stated he lawfully might do, the same being then and there a public nuisance, and denies the damage, and asks to be dismissed, with costs, etc.

There was a good deal of testimony given as to the value of the building and goods contained in it, and as to the necessity for its destruction at the time. The proof was, however, that the fire in a very few minutes reached the site of the building, and extended beyond it, and that its destruction would have been certain if it had not been blown up.

On the 25th October, 1856, the court in banc, sitting as a jury, on a reargument of the case, found for the plaintiffs in the sum of \$7500, and ordered judgment accordingly.

From which defendant appealed.

Dwinelle and *Holt*, for Appellant.

The question of law is, whether a person or public officer has a right to pull down a building, acting in good faith for the purpose of preventing the spreading of a public conflagration, without being personally liable therefor in damages.

The law of Mexico prevailed at the time of the conflagration, when the damage is alleged to have been done, in December, 1849. (1 Pet. 511, 542.) By that law, the individual who in *good faith* destroyed a building, to prevent the spread of a public conflagration, was expressly held not liable in damages. (7 Partides, Title 15, Law 10.)

[71] *Such destruction is not done solely on one's own account, but for that of the whole city; for it might happen that if not thus arrested, the fire might spread over the whole town, or a great part of it; and acting with a good intention, he is not answerable in damages. (Ib. pp. 39,

440.) If a private individual could do this, *a fortiori*, could the chief magistrate of the city do it?

The same rule prevails at common law, and is a principle of public law everywhere.

And property so destroyed is not "taken for public use," nor does the principle of compensation apply. (Constitution California, Art. 1, sec. 8.)

The act is not that of the sovereign exercising the right of eminent domain, but an act of private necessity, done for private advantage, like that which authorizes the appropriation of a plank by one which will not sustain two in the water. (2 Kent. Com. 338; 1 Dall. 369; 1 Zab. 257, 258, 260, 264, 265; S. C. in error; Ib. 728; 17 Ward, 290, 291; S. C. 18 Wend. 129; 25 Ib. 174; 2 Denio, 473, 483, 484, 485; 1 Cal. 356; 21 Wend. 367.) Although the act of destruction is for the public benefit, in one sense, it is so only as a matter of police, and those whose property is saved by it, reap the benefit, and ought to contribute, if any one is to be held accountable, on the principle of general average. (Moyer et al. v. Lord, 18 Wend. 130; 25 Wend. 176-7.)

The mode of compensation in certain cases, and who is to make it, is provided for by the application of general principles. (14 Wend. 51; 10 Wend. 659; 6 Wend. 634; 20 Johns. 785; 1 Bald. 228; 8 Greenl. 365.) The party benefited may be sued for compensation (1 N. H. 339; 7 Mass. 202); and if several, for contribution. (18 Wend. 138; 25 Wend. 176-7.)

As to the necessity for the act complained of, that must be taken to be necessary, which is judged to be so by the judgment of discreet men, who have knowledge of all the circumstances. We are not bound to await the event in judging of the necessity of a protective measure, as in throwing goods overboard to lighten the vessel: the gale may cease, but the master is not liable for the loss. "Doing the act with good intentions," taken from the Spanish law, is a phrase illustrative of the principle of *justification. In this [72] case the fire actually reached the site of the building after its destruction.

We ask that the judgment be reversed, and that an absolute

judgment be entered for the appellant. The case is governed by the Practice Act of 1850, under which this Court have authority to render such judgment as substantial justice may require, secs. 162, 271, 275, 279; and this appeal was taken before that act was repealed, Min. Sup. Ct., vol. 2, p. 5, and is saved by the repealing Act of 1851, sec. 648.

No brief on file for respondent.¹

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiff's house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed, they were engaged in removing their property, and could had they not been prevented have succeeded in removing more, if not all of their goods.

The cause was tried by the Court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

[73] *This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

¹ The case of Heatley et al. v. Geary, decided at this term, was a claim of like character with the preceding, and supported by like evidence, and held by the Court to involve no new principle: it is, therefore, not deemed necessary to report it.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata.*"

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See *American Print Works v. Lawrence*, 1 Zab. 258, 264, and the cases there cited.)

This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes *belongs to the State, by virtue of her right [74] of eminent domain, and is said to be justified on the

ground of State necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved: they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

[75] *The Court below clearly erred as to the law appli-

cable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

CONNALLEY, Appellant, v. SYLVESTER F. PECK, ROBERT McDOWELL, JOHN A. PECK, JAMES B. McDOWELL, ROBERT MILLS, DAVID G. MILLS, and JOHN McNISH, Respondents.

VARIANCE, AMENDMENT TO PLEADINGS.—Where the proof does not sustain the allegations of the bill, and where by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done, it is error.

APPEAL from the Fifth Judicial District, San Joaquin County.

The complaint sets forth that the plaintiff obtained judgment in the District Court against defendant, on the 3d February, 1851, for \$3921, with interest at eight per cent. per month, which was duly recorded, February 6th, 1851. That he issued several executions thereon without effect, and on the 13th September, issued an alias execution to the sheriff of San Joaquin County, who levied on a lot in the city of Stockton, of which the plaintiff became the purchaser, at sheriff's sale, on the 9th October, 1850, and holds the sheriff's deed for the same. Which lot plaintiff further shows was, on the — day of —, 1850, purchased by Sylvester F. Peck, for \$4500, from one Charles Weber, when the greater part of the purchase-money was paid, and a bond for title duly made and delivered, together with the possession of the lot, the conveyance to be made when the residue of the purchase-money should be paid. That Peck erected buildings thereon, and leased them, receiving rent from the tenants, out of which the residue of the purchase-money due to Weber, except about \$400, was paid previous to the levy and sale, and the entire balance since the levy, etc.

[76] *That John A. Peck was lately associated in business, in the city of New Orleans, with defendant, Robert McDowell, under the firm of McDowell & Peck; that defendants, Robert and James R. McDowell, and Robert and David Mills, are co-partners in the city of New Orleans, in the name of McDowell, Mills & Co., and are the assignees or successors in business of McDowell & Peck, aforesaid. That the defendant, John McNish, who claims to be the agent of, or attorney in fact, of the late firm of McDowell & Peck, and also of the firm of McDowell, Mills & Co., is now in the receipt of the rents, etc., of the said lot, and refuses to pay the same to the plaintiff, or to account to him therefor, in fraud of plaintiff's rights, etc. That defendants, colluding, etc., pretend the title to the said lot is in McDowell, Mills & Co., by transfer from Sylvester Peck to McDowell & Peck, and from them to McDowell, Mills & Co.

And charges that defendants fraudulently, after the levy and sale to plaintiff as aforesaid, caused Weber to make a deed, conveying the legal title of the lot to said McDowell & Peck, but fraudulently had the same antedated, so as to bear date February 1st, 1851, and that McNish, about the same time, pretending to act as attorney in fact for McDowell & Peck, conveyed the same to McDowell & Mills, which deed was also fraudulently antedated, so as to bear date 1st September, 1851. That the first deed was acknowledged 17th September, and recorded the 23d of the same month; and the second was acknowledged the 22d, and recorded the 23d September, 1851; which deeds plaintiff charges were made without any consideration, save the payment of the purchase-money out of the rents, etc., and were made to defraud creditors, and are void against the plaintiff; and prays that defendant be compelled to answer on oath; enjoined from collecting any more rents, etc.; for a receiver; the pretended conveyances to be declared fraudulent and void, and plaintiff vested with the legal title; and such other and further relief, etc.

John A. Peck, one of defendants, answered, that Sylvester Peck, in the year 1850, with the advice and consent of this defendant, made a contract with Weber, mentioned in the complaint, for the purchase of the said lot in Stockton.

That this defendant, and Robert McDowell, doing business in *New Orleans, under the name of McDowell & Peck, and the said Sylvester Peck, and one Reading, doing business at Vicksburg, under the firm of Reading & Peck, were jointly interested in shipping certain lumber and houses to California, each firm being entitled to half the profits, and to share half the losses arising from the venture. That the buildings erected on the lot in Stockton was a part of those shipped on joint account for said firms; that the said lot was so purchased for account of the said joint concern, and that the funds of McDowell & Peck, of New Orleans, were paid therefor; that Sylvester F. Peck had no further interest in the purchase of said lot or buildings erected thereon, than as a portion of said joint venture, and that the deed of the said lot was taken in the name of McDowell & Peck, because they were the creditors, as between the partners in the said venture, having made by far the largest advance on account thereof. That the firm of McDowell, Mills & Co. succeeded to that of McDowell & Peck, and to them was duly transferred the said lot and buildings, they taking the place of McDowell & Peck in the said joint venture. [77]

That the firm of Reading & Peck are indebted to the firm of McDowell, Mills & Co. over \$40,000 for their share of the losses sustained in the venture; that the lot, etc., is partnership property, and liable as such, and will prove insufficient to pay McDowell, Mills & Co. the amount of their advances over and above those made by Reading & Peck.

That this defendant has no knowledge as to the antedating of the deeds as charged, and leaves the plaintiff to his proof, and denies all collusion, fraud, etc., and disclaims any interest in the lot or buildings. Sworn to 4th February, 1852.

The answer of Robert McDowell, James K. McDowell, Robert Mills, David G. Mills, and John McNish, admits the contract for the lot, in ———, 1850, between S. F. Peck and Weber, but denies that the purchase-money, or any part of it, was paid by S. F. Peck to Weber, but that he, shortly after the contract, transferred his interest therein to J. McNish, as the agent of McDowell & Peck, who rented the

buildings, using the lumber, materials, and money belonging to McDowell & Peck; and as agent aforesaid, paid to [78] Weber the entire amount of the purchase-money *contracted to be paid by S. F. Peck, out of funds belonging to McDowell & Peck, and took the deed to them, who, by the said agent, conveyed the lot, on the 1st September, to McDowell & Mills; and denies that S. F. Peck ever paid any portion of the purchase-money for said lot, or that he erected any buildings thereon, or exercised any control over the same after the conveyance to McNish, as agent of McDowell & Peck, who received the rents, etc.; and that Weber, on the payment of the purchase-money, as aforesaid, by McNish, on the 1st February, 1851, conveyed the said lot to McDowell & Peck, who by McNish, their agent, conveyed the same, for a valuable consideration, on the 1st day of September, to McDowell & Mills; and denies all fraud, etc., all the allegations of the complaint not admitted, etc., and prays judgment for costs, etc.

Sylvester F. Peck deposed that he purchased the lot of Weber, in the last of July or beginning of August, 1850: the price agreed to be paid was \$4500—\$1000 in sixty days from the date of the title-bond, the second in ninety days, and so on. All the payments were made up to the time the title-bond was transferred, by lumber and the proceeds of the yard, except about \$400, as appeared by the books kept by McNish, who was the agent of the company, and acting under deponent's directions; deponent transferred the title-bond in the latter part of December or forepart of January, 1851, and knows nothing of the payments since the transfer. The title-bond was executed by Weber to deponent, but Robert McDowell, John A. Peck, A. B. Reading, and himself, were the parties interested, each equally. Deponent assigned the bond and all the property and debts to McDowell and J. A. Peck, and delivered it to their agent McNish, expressly to pay, first, the mechanics for building on the lot; secondly, to pay D. W. Connalley, the plaintiff, for money borrowed of him, for the use of the company, and other purposes specified—the balance, if any, to go to McDowell & Peck, to cover advances made by them above those made by Reading & S. F.

Peck; and this transfer was made in consideration of the agreement of McDowell & Peck, by McNish, their agent, to assume and pay the demands above specified. The debt to Connalley was the same on which he obtained judgment for \$3921. *The money so borrowed was ap- [79]plied to the use of the company. The business of the company, in the purchase of the lot, and erection of the buildings, and its general business, was done in deponent's name, but for its benefit.

Plaintiff also produced a paper, signed by John McNish, dated May 18th, 1851, by which he, McNish, bound himself "to appropriate the proceeds of the lumber, and of the real estate in Stockton, belonging to McDowell & Peck, and Reading & Peck, to the payment of the debts due by them, giving D. W. Connalley the preference of his claim against said concern."

Edward Harrison deposed that the deeds from Weber to McDowell & Peck, and from McNish, attorney, etc., to McDowell, Mills & Co. were, at the request of McNish, prepared by him (the witness); that they were prepared and signed about the time of their respective dates, but remained in his possession, or were not in fact delivered, until the date of the acknowledgment of each respectively; that no one of defendants was present, except McNish, who, as to the last-mentioned deed, assumed to act for both grantor and grantee.

John McNish, on the part of defendant, deposed that he came from New Orleans to California about the — day of —, 1850; that as soon as the title-bond, from Weber to S. F. Peck, was made, he, as agent of McDowell & Peck, took possession of the lot, superintended the erection of the buildings thereon, and other business of the concern, and has had continued possession ever since, as agent of the parties in interest; that he attended to the making the payments of the purchase-money to Weber; that there was no dissolution of the partnership at the time of the assignment of the bond between Reading & Peck, and McDowell & Peck. That when he made the writing above mentioned, to pay the judgment due to plaintiff, he did so under a misrepresentation made by S. F. Peck, by which he was induced to believe that the

judgment was recovered against each of the partners in the concern.

That the buildings were erected on the lot, and the entire amount of the purchase-money paid to Weber, from the funds of the firm of McDowell & Peck, by the witness, as agent of the said firm, from moneys arising from the sale of [80] lumber or *buildings, shipped by McDowell & Peck, of New Orleans, and Reading & Peck, of Vicksburg.

The title-bond, and the several deeds, assignments, powers of attorney, and papers referred to by the witnesses, were given in evidence.

The parties having waived their right to trial by jury, the cause was submitted to the Court, who found for defendant, and ordered judgment accordingly, and plaintiff appealed.

A new trial was not moved.

The Court below, upon the facts in evidence, found the judgment of plaintiff, the levy, sale, and sheriff's deed for the lot, as above set forth.

Also the contract between S. F. Peck and Weber, for the lot, the title-bond; which bond was never recorded; the transfer on the 1st December, by S. F. Peck to McNish, agent of S. F. Peck, and R. McDowell, of New Orleans (McDowell & Peck,) of all his right, title, and interest to said lot, buildings, etc., and to the title-bond. That McDowell & Peck, through their said agent, paid to Weber the whole purchase-money, cancelled the bond, and received, on the 1st February, 1851, a title from Weber, to said lot, under the names of Robert McDowell and John A. Peck, of New Orleans, who on the 1st September, 1851, had conveyed to McDowell & Mills, the successors of McDowell & Peck. That McDowell and Peck, and Reading & Peck, were jointly concerned in a venture of lumber sent to California; that S. F. Peck, of the firm of Reading & Peck, brought a portion of this to Stockton, and contracted with Weber for the lot, for the benefit of the parties in said joint venture; that at the time of the transfer, from S. F. Peck, of his interest in the lot to McDowell & Peck, McNish, then agent, promised to pay a debt due from S. F. Peck to Connalley, the plaintiff,

and that the promise was made through the misrepresentation of S. F. Peck to McNish.

"The conclusion therefore is, that at the time of levying the execution, the defendant, S. F. Peck, had no interest in the property, lot, or houses levied on, and that the other defendants, in whom the title to the property is, are not liable under the judgment."

[The opinion of the Court does not designate the special defects *in the pleadings which form the basis [81] of the decision, nor that portion of the evidence alluded to as entitling the plaintiff to relief, if the bill had embraced it; nor does the record show that the ground upon which the case turned was assigned for error, or argued by the counsel. The reporter, therefore, can only give an abstract of the bill, answers, and evidence, together with the opinion of the Court, as the best view of the case which the record affords.

HEYDENFELDT, Justice, delivered the opinion of the Court, with which WELLS, Justice, concurred.

In the examination of this case, two positions appear to be very clear: first, that the proof does not sustain the allegations of the bill; second, that by the proof, the complainant is entitled to relief in a court of equity, if his pleadings had been properly proved.

The question, therefore, for consideration is, whether the Chancellor acted properly in dismissing the bill, or if he should not, at the hearing, have directed an amendment of the bill, or leave to file a supplemental bill.

As the latter course would save expense and circuitry of action, it is in my opinion the better, if it can be sustained by authority.

The main conflict between the cases I have examined seems to be, whether an amendment or a supplemental bill should be allowed.

Judge Story has treated the question according to the variety of decisions. In his Eq. Pl., sec. 891, he says: "If upon hearing the cause the plaintiff appears entitled to relief, but the case made by the bill is insufficient to ground a com-

plete decree, the Court will not allow an amendment, but it will sometimes give the plaintiff leave to file a supplemental bill, to bring before the Court such matter as is necessary, in addition to the case in the original bill." "And in some cases, where a matter has not been put in issue by a bill with sufficient precision, the Court has, upon the hearing of the cause, given the plaintiff liberty to amend the bill."

He also says, that amendments are allowed to defendants *with much more caution than to plaintiffs.

And yet it is uncommon to refuse these amendments whenever a proper case is made out.

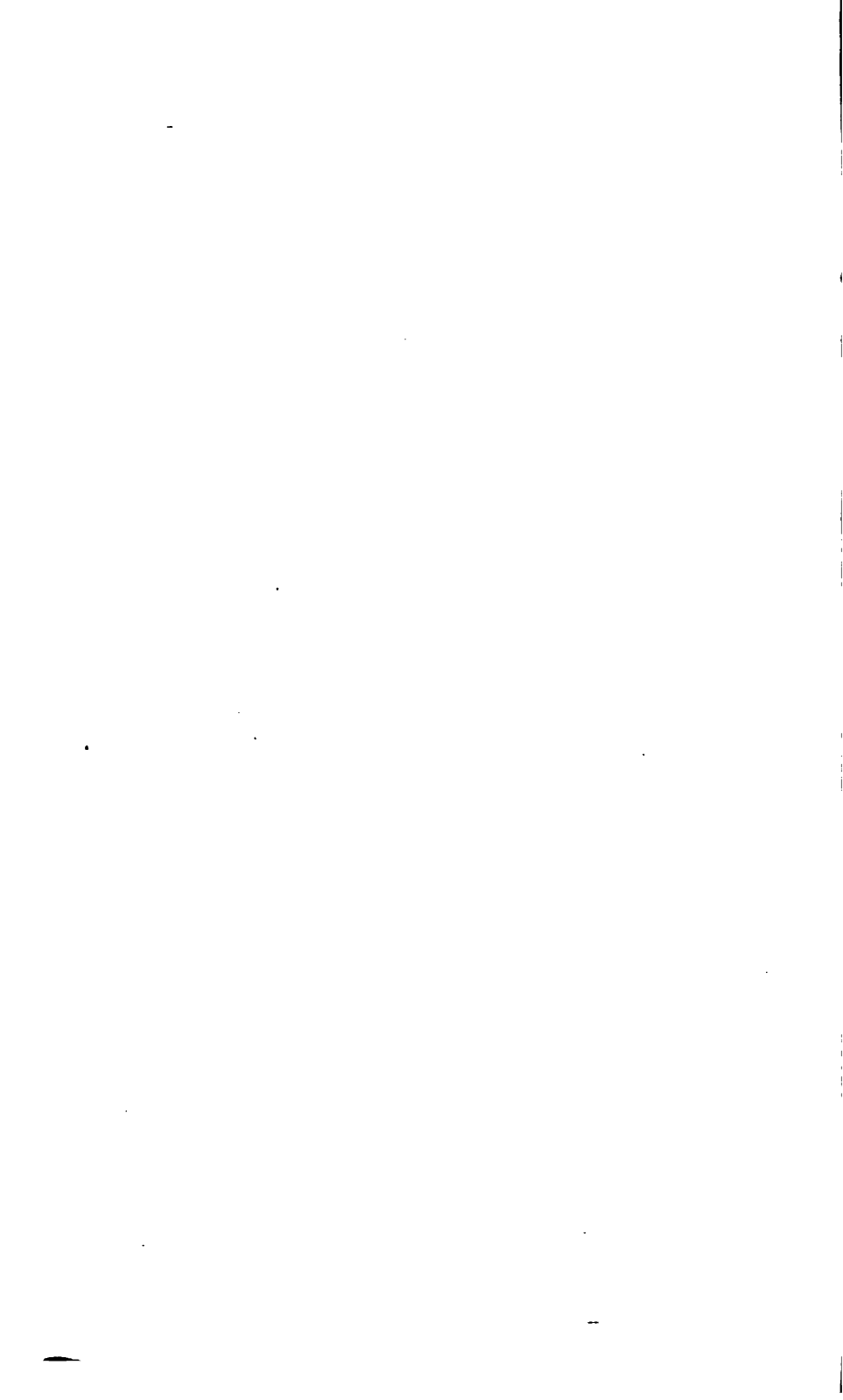
At sec. 902, the same author proceeds: "Upon the hearing of a cause, the same indulgence will be granted to a defendant as to a plaintiff. If it has appeared that the defendant has not put in issue facts which he ought to have put in issue, and which must necessarily be in issue to enable the Court to determine the merits of the case, he will be allowed to amend his answer for the purpose of stating those facts."

It seems to me that the true doctrine to be declared, as consonant with the authorities and with the spirit of equity, is, that whenever the evidence conclusively shows the party entitled to relief, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits, and that whenever this is not done it is error.

The present case falls within this doctrine, and it necessarily follows that the decree must be reversed, and the complainant below be permitted to amend his bill, or file a supplemental bill.

The costs will abide the event of the suit.

APRIL TERM, 1853.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

APRIL TERM, 1853.

TERESA SNYDER, Appellant, v. ADELIA WEBB,
Respondent.

PARTIES, MARRIED WOMAN.—The Practice Act gives to a married woman the right to sue without her husband, where the action concerns her separate estate.

MARRIED WOMAN, SEPARATE PROPERTY OF.—Under the act, property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property.

IDEM, COMMON PROPERTY.—The rents and profits of the separate property are declared to be common property.

HUSBAND AND WIFE, STATUTE CONSTRUED.—The act governs if there be no marriage contract containing stipulations contrary thereto.

MARRIAGE, STIPULATIONS AS TO PROPERTY.—The act confers on the parties, before marriage, an unlimited right to make whatever stipulations they may agree upon in respect to property, and this is not confined to property *in esse*, but contemplates property to be acquired, and the rents and profits of the present estate.

MARRIED WOMAN, RIGHTS OF, HOW SECURED.—Our statute does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects, the common law remains unaltered, and the wife may resort to trustees for all purposes of security.

HUSBAND, WHEN REGARDED AS TRUSTEE OF WIFE.—If the husband should take the rents and profits of her estate, he will be held to account for her benefit, to the same extent as if he had undertaken a specific trust.

MARRIED WOMAN, DISABILITY TO CONTRACT.—The law which deprives a married woman of the right to make contracts is not altered by the statute, unless in respect of the property specified by it, and she cannot bring suit in her own name upon a contract which she was not authorized by the statute to make.

APPEAL from the Fourth Judicial District.

The plaintiff's complaint sets forth that on the 4th of August, 1851, defendant leased from plaintiff certain premises (described in the lease, which is set out under the hands and seals of plaintiff and defendant,) for the term of one month, with the privilege of occupying the same for the further term of three months thereafter, at the rate of \$450, payable monthly in advance, *which privilege she availed herself of, and continued in the occupation thereof, and claims \$450 from the 4th of September, 1851, to the 4th of October, 1851.

Other matters were claimed by the plaintiff, which are not material to the case, as considered by this Court.

The defendant answered, that before, and at the time of the commencement of this suit, the said plaintiff was, and still is, married to one Snyder, then, and yet, her husband, who is still living in the said city and county, and cohabiting with said plaintiff, and denies that she (defendant) elected to continue in the occupation of the premises under the privilege, etc., and that plaintiff entered upon, and ejected her about the 4th of September, and denies indebtedness, etc.

March 4th, a nonsuit was ordered by the Court, and judgment for defendant for costs, from which plaintiff appealed.

The cause was tried by the Court, without a jury. The plaintiff on the trial admitted the truth of the plea of coverture, gave in evidence the said lease, and then a marriage contract between her and Henry M. Snyder, her present husband, which is set out, made the 26th of February, 1851, and states that the said Teresa is seised and possessed of certain real and personal estate in her own right (described in a schedule annexed,) that a marriage is about to be solemnized between the said Henry and the said Teresa, and that in consideration thereof it is mutually agreed between the parties, that all property, of every description, which shall be acquired by either of the said parties after the said marriage, whether by gift, bequest, devise, descent, purchase, or otherwise, shall be and remain the separate property of the party so acquiring the same. That the party of the first part shall have no man-

agement or control of the separate property of the said Teresa, but the exclusive management and control thereof, whether now held or hereafter acquired by her, with absolute power of disposing of the same as she should see fit, should be and remain in her during the said marriage, and also the rents, profits, interest on moneys, etc., arising from the separate property of either party, shall not be deemed common property, but that all such rents, etc., arising from the separate property of the said Teresa, or acquired by her, shall be and *remain under her entire management and [85] control, power, and disposal, during the said marriage, etc.

Plaintiff then offered a lease from Palmer, Cooke & Co., to her, for the premises in question, the execution of which was admitted by defendant, but objected to the paper as irrelevant, which the Court sustained, and plaintiff excepted.

The lease is dated 1st of July, 1851, between Palmer, Cooke & Co., and Mrs. Teresa Snyder, and signed and sealed by them.

The Court below held, that as there was no evidence that the subject-matter of the action was the separate property of the plaintiff, the fact of the defendant having covenanted with the plaintiff does not raise a presumption that the contract was in reference to her separate property, and inclined to the opinion that she should have shown a right to sue, in her complaint, by an averment that she was a married woman, and that the action related to her separate property. That, at all events, she is bound to prove affirmatively, that the suit relates to her separate property, and there being no such proof, judgment of nonsuit was ordered as above stated.

Charles E. Mount, for Appellant.

The marriage contract shows that plaintiff, as to her property, was to be regarded as a *feme sole*, and this as to after-acquired property, and that she was to have the rents, profits, etc., that should arise therefrom.

She took the lease of Palmer & Cooke as separate property; it is to her, her heirs and assigns.

The defendant is estopped by her lease from denial of plain-

tiff's title, and her right to sue, unless she has shown interest in the husband.

A married woman may sue alone where the action concerns her separate property. (Prac. Act., sec. 7, p. 52; 2 Cal. Rep. 63.)

McCracken and Brooks, for Respondents.

The ante-nuptial agreement shows that the property in question was not the plaintiff's separate property, and that instrument gives her the control and rents of her separate property, acquired after marriage as well as that held at the time; but it gives her no right to make or take leases, to contract [86] under seal, *or otherwise, nor to acquire property in any other way than that pointed out by law.

The right of plaintiff to sue depends on the 7th sec. of the Practice Act, which gives her the right to sue without her husband where the action concerns her separate property.

The act makes the separate property of the wife to consist of property held before marriage, and that acquired after by *gift, bequest, devise, or descent*. The premises come under neither of these heads, and section 2 of the same act, declares that all property acquired after the marriage, or otherwise, shall be common property.

The parties cannot by their agreement alter their rights as fixed by the statute. Their contract can only reach *things* real or personal, *in esse*. Their rights as husband and wife are fixed by the law, and the law cannot be repealed by contract. And the common law, where it is not altered by the statute, remains in force. Her deed is a mere nullity. (Chit. on Con. 150; Walker, 322; 3 Wheat. 309; 6 Ala. 737; 3 Humph. 80; 1 N. & M. 33; 7 Mass. 254; 12 Pet. 345.)

She cannot contract; and the powers granted are to be limited to the strict meaning of the terms creating the estate. (4 Ves. 375.)

The lease, if of any force, vested instant in the husband. (5 Shep. 301; 17 Pick. 391; 5 Met. 320; 15 Cow. 587; 8 Mass. 229.)

Sec. 9 of the statute gives the rents of common property to the control and disposition of the husband. They are his

absolutely at common law. (17 Vin. 626; 2 Smedes & M. 165.) Could be taken by his creditors and go to his executors.

We are not estopped by the lease, which we say is void. (3 J. E. 101; 3 Bart. 634.)

The law does not in any case allow a married woman to sue without a *prochein ami*. (6 How. 53, 233, 396.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Our Practice Act gives to a married woman the right to sue without her husband where the action concerns her separate property.

Under the acts defining the rights of husband and wife, the *property of "the wife owned by her before [87] marriage, and that acquired afterwards by gift, bequest, demise, or descent, shall be her separate property."

The rents and profits of her separate property are declared to be common property.

The 14th section of the act provides: "In every marriage hereafter contracted in this State, the rights of husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto."

The record discloses that there was a marriage contract between the plaintiff and her husband, by which, notwithstanding the marriage, she was to have the entire management of her separate estate; that its rents and profits were also to be a part of her separate estate, as was also to be all property acquired by her after marriage, whether by purchase or otherwise.

It is now urged that the statute is in derogation of the common law, and must be strictly construed; that it confers no power on the wife to make contracts, and therefore she took nothing by her purchase from Palmer, Cooke & Co., or it enured to the benefit of her husband.

The 14th section of the act before cited certainly confers upon parties an unlimited right to make before marriage whatever stipulations they may agree upon, in respect to property; and it is not confined to property *in esse*, because,

as many of the provisions of the act refer to property to be acquired, and to the rents or profits of the present estate, it follows that it must contemplate a departure from these provisions by express contract, as well as from any other.

At common law, the separate estate of a married woman was usually, if not always, created by the interposition of a trustee; and the trustee had power, either by the terms of the covenant or under the direction of the Court of Chancery, to invest all money arising from the rents and profits of the trust estate, when no other application of it was more beneficial to the wife.

In such cases, the rents and profits are always treated as part of the separate estate; and we see no reason why that which was the rule at common law should not be allowed as a proper stipulation in a marriage contract under our statute.

[88] *But the question arises, is the law altered which deprives a married woman of the right to make contracts?

This is a question involving some embarrassment, and I have given it much deliberation. My first conclusion was that in dealing with separate estates, our statute intended to abolish altogether the formality of interposing trustees, but by giving it the strict construction which is required by the rules of law, I am now satisfied that such interposition is only rendered unnecessary in respect to the property specified by the act. In all other respects, the common law remains unaltered. The wife is not given the power to make contracts, nor is such power necessary for the preservation of any portion of what is, or what may become, her separate estate. She may still resort to the use of a trustee for all purposes of security; or, if her husband should purchase or invest with the rents and profits of her estate, he will be held to account for her benefit in the same manner, and to the same extent, as if he had undertaken a specific trust.

It follows, from this view of the question, that the plaintiff had no authority to enter into the contract declared upon with the defendant, so as to entitle her to bring suit in her own name, and the judgment must be affirmed, with costs.

***DANIEL LINN, Respondent, v. TWIST, EDDY & [89]
Co., Appellants.**

¹ **NEW TRIAL, STATEMENT, WHAT REQUISITE.**—If the statement filed in support of a motion for a new trial, under the 195th section of the Practice Act, is not sealed by the Judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be sealed by the Judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected.

APPEAL from the Tenth Judicial District.

This was a suit brought for the recovery of \$1000, which the plaintiff claimed of defendant for thirty mining claims, and a cabin, sold and delivered, as the complaint alleges, by the plaintiff to the defendants.

The defendants deny any purchase of claims or cabin from plaintiff, and deny all indebtedness to him. The cause was tried by a jury, who found for the plaintiff \$1000, for which judgment was entered, with costs, etc.

The defendants moved for a new trial, which the Court below refused; and from this order the defendants appealed.

Several witnesses were examined by the respective parties, and the testimony taken was embraced in the statement offered in support of the motion for a new trial, but the statement was not agreed to by the parties, nor sealed by the Judge below. This defect was the only point considered in the opinion of the Court.

The briefs filed do not discuss the ground of decision.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The 195th section of the Practice Act, referring to the statement to be made in support of an application for a new trial, says: "Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be sealed by the Judge, upon notice."

It is now insisted, that because the statement in this case

¹ Denied, *Dickinson v. VanHorn*, 9 Cal. 210.

is not sealed by the Judge, it must be inferred that it [90] was agreed to. *To this argument I cannot assent. It is very clear, that to make the statement good, it must either be agreed to or it must be sealed by the Judge; and one of these conditions must be shown affirmatively.

That it is not sealed by the Judge, instead of proving that it was agreed to by the parties, imposes on the appellant the necessity of showing that it was agreed to; and as the record does not show this, the statement must be rejected.

Any other practice than that here indicated would be loose and dangerous. No mode is pointed out for a party to disagree to a statement, and the burden ought to be put on the one who desires to make it perfect. A statement may be filed which would be a distortion of the case as really proved: this of course would not be agreed to, nor would the Judge seal it as correct; and yet, being on file as the statement of the party for the purpose of a new trial, it would be copied into the record, and sent for adjudication to this Court.

The judgment must be affirmed.

RAMSAY et al., Respondents, v. CHANDLER et al.,
Appellants.

NUISANCE, DECREE IN ABATEMENT OF.—Where a nuisance, by overflowing plaintiffs' mining claim by means of a dam erected by defendants, was found, the decree should have ordered such a reduction of the dam as would have prevented any overflow, from that cause, of the plaintiffs' ground; or, if necessary, an entire abatement.

INJUNCTION, WHEN ALLOWED.—And a perpetual injunction to restrain the defendants from raising their dam higher than the point designated was allowed.

APPEAL from the Eleventh Judicial District.

The complaint sets forth that the plaintiffs are owners of a certain mining claim on the South Fork of American River; and, about the 1st April, 1850, had erected a dam and dug a race sufficient to carry off the water, and leave the bed of the river dry enough to work for gold and for mining purposes;

¹ Cited, *Kittle v. Pfeiffer*, 22 Cal. 492.

and set forth title, claiming under Winters, Marshall, and others, the admitted owners, who also granted the right to plaintiffs to tear *down an old milldam, so as to [91] head off the said stream above, and enable plaintiffs to work out the space occupied by the millpond.

That said defendants, about the 25th June, 1851, erected a dam across the said stream, below said mill, and obstructed the current, so as to throw back the water and overflow the whole claim of plaintiffs, and prevent them from working it from June 25th, 1851, to 5th July, to their damage \$3000; and pray an abatement of the nuisance.

The bill further charges, that defendants are about to erect an addition upon their said dam, which if done will wholly ruin their said claim; that they (defendants) are wholly insolvent; and therefore pray for an injunction to restrain them from raising the said dam. The bill was sworn to by two of the plaintiffs; and the Court granted the writ of injunction as prayed for.

The defendants first demurred to the complaint, and then answer and say, that long before the plaintiffs had purchased or established their claim, in June or July, 1850, defendants had contracted with Winters and Marshall, and others, the owners, who conveyed to defendants the right to excavate a race on the said South Fork, below Colonna, and to turn said stream from its course, and to erect a dam for that purpose at the point where the dam is at present, and to flow back the water so much as to enable them to work the bed of said river, below said dam, for gold-mining purposes; and for any injury that said mill company might sustain in consequence of the dam, defendants agreed to pay, and are bound to pay, ten per cent. of all gold mined on said claim; and defendants claim a right to flow back the water, under the said contract, as far as necessary to enable them to drain and work the bed of said river. They also claim by priority of location; and pray a dissolution of the injunction, etc.

The cause was submitted to the Court without a jury.

Both parties claimed under the same company, called "The Colonna Sawmill Company," of which Winters and Marshall are members.

Plaintiffs proved, that in December, 1851, they purchased of said company their entire right to the mill, (except the house and machinery,) milldam, the mining claim described in the bill, the water privileges of said company, the [92] right to tear away the *dam, to cut a race for the purpose of draining the bed of the river for mining purposes, and raising a dam at the head of the race for diverting the water, for which they paid \$7500 down, and were to pay five per cent. out of all the gold taken from the said claim; and that plaintiffs took possession immediately after said purchase, and expended thereon labor and money to the amount of forty or fifty thousand dollars. To the introduction of this testimony defendants objected. The Court overruled the objection, and defendants excepted.

Plaintiffs further proved, that about the 25th June, 1851, they had completed their race, and had turned the water of the river into it, by means of a dam at the head thereof, and had drained the bed for mining purposes, and were proceeding to take from said dam large quantities of gold, when the defendants erected a dam about eight feet high across the said river, and flowed the said river back on the mill-wheel to the depth of two or three feet, and on the plaintiffs' claim to the same depth, and prevented the plaintiffs from working the same; that plaintiffs had 100 men at the time, who were prevented from working by the back-water, from the 25th June until the trial, and that labor was worth from four to five dollars per day.

Defendants read in evidence certain articles of agreement, made with the mill company on the 17th June, 1850, authorizing defendants to cut a race or canal across a neck of the mill company's land, near the said mine, so as to lay bare the bed of the said river for mining purposes. That they commenced immediately after the date of the articles on the tunnel, and in November on the dam, which in March, 1851, was raised to its present height; a part of the dam was washed away, and was replaced shortly before this suit was brought, and is no higher than is necessary to turn the water into the tunnel as the same is now constructed.

Plaintiffs proved that the mill was in operation, at the time

the agreement was made between the mill company and defendants, and making from six to eight hundred dollars per day.

They also proved that there was about 22 feet fall from where the water enters the tunnel to where it is discharged, the principal portion of which was at the lower end; that the tunnel could have been cut deeper some two or three feet, but at a large *expense, as the floor was granite. [93] It was also proved that the tunnel might have been made wider at the upper end, and of the same depth, without very great expense, and if enlarged either way, the water might be carried off without flooding plaintiffs' dam and pool.

The Court found that defendants had trespassed on plaintiffs' rights by throwing back the water upon their mining claims to the depth of two feet, and ordered that the plaintiffs, within ten days, reduce the water to the same extent, and in the manner least injurious to defendants' dam; and that the injunction issued be perpetual, and that defendants be forever enjoined from constructing any impediment in the river, so as to raise the water above the point to which it is directed to be reduced by this judgment.

No briefs are on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

No points have been filed in this case by the counsel on either side, and we have had to examine it without such aid.

It is a bill in Chancery for the abatement of a milldam. In the decisions of the Court below upon the admission of evidence I can see no error.

The decree of the Court requires a diminution of the defendants' dam to the extent of two feet. The only evidence on the question of injury shows that the plaintiffs' claim was overflowed two or three feet. The right is clearly with the plaintiffs, and so the District Judge found. The decree should have ordered such a diminution of the defendants' erection as would have prevented any overflow, from that cause, of the plaintiffs' mining ground, or if necessary, an entire abatement.

I do not think the decree has gone beyond what is clearly warranted by the evidence.

Judgment affirmed, with costs.

[94] *D. O. MILLS, J. MILLS, and E. TOWNSEND,
Respondents, v. DUNLAP and B. McCULLOCH,
Appellants.

DEPOSITION, OBJECTION TO, WHEN TO BE TAKEN.—A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial.

IDEM, DECISION ON MOTION IN DISCRETION OF COURT.—The decision of such motion rests in the sound discretion of the Court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made.

IDEM, PAROL PROOF OF NOTICE.—Proof of notice to take a deposition where the written notice was defective, was held good, when made by parol, and conforms substantially to the statute.

NOTICE, VALIDITY OF.—A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice.

CERTIFICATE OF NOTARY AS EVIDENCE.—The certificate of the notary as set forth in the case was sufficient.

APPEAL from the Sixth Judicial District.

The facts of this case are stated in the opinion of the Court. The plaintiff claimed of defendant the value of certain property, which had been seized by the sheriff, on execution issued by Dunlap against Solms and Hutchinson, and which he claimed as his own property. In the course of the proceedings, the deposition of G. W. Solms taken before a notary, was filed, February 19th, 1852, on the part of the plaintiff, and on the same day defendant moved the Court to *suppress the reading* of the same, for the following reasons:

1. Because notice of the taking was not given as required by law.

2. Because the deposition was not taken in the above entitled cause, but in some other.

3. Because the order in reference to taking the same was not made in this action, but in the case of D. O. Mills et al. v. P. Dunlap.

4, 5. Because the affidavit upon which said order was based is insufficient in law, is void for uncertainty, and was not taken and certified as required by law.

6, 7. The notice did not state the time or place where the *deposition would be taken, nor was it signed by [95] plaintiffs or their attorney.

8. The deposition was not read to witness by the officer, and corrected by him before it was subscribed.

9. The time and place of taking is not set out.

10. Is not certified as required by law.

11. The witness was not sworn before his examination.

The Court overruled the motion to suppress, and defendants excepted.

The trial was then proceeded with, and a verdict for plaintiffs was rendered. 'A motion for a new trial was overruled, and this appeal was taken.

On the hearing of the motion to suppress the deposition of Solms the notice was produced, addressed to P. Dunlap, "that witness would be examined, on plaintiffs' behalf, this day, at the office of Winans & Hyer, No. 73 I Street, at 2 o'clock, P. M., before C. C. Sackett, a notary public in and for Sacramento County."

The notice is not dated.

The order for taking the above deposition was based upon the oath of D. O. Mills, plaintiff, that Solms was a material witness, and was about to leave the country in which the suit was to be tried, and would probably be absent when his testimony would be required.

John G. Hyer, attorney for plaintiff, was offered, to prove that defendant had notice of the time and place of taking the deposition. Defendant objected to the proof by parol, as the law requires such proof to be in writing; which objection was overruled, and defendant excepted. The witness testified that he had served notice on defendant that the deposition would be taken between 11 and 12 o'clock M., of the day said notice bears date; that defendant told witness he could not attend, and that if he could shut the deposition out, he would.

The return of the notary stated that the depositions were sworn, etc., "before Charles C. Sackett, a notary in and for

the County of Sacramento, taken at the city of Sacramento, and pursuant to an order of Court, etc., and was dated the 10th February, 1852."

[96] *The order of Court directing the deposition of Solms to be taken, bears the same date with the certificate of the notary.

There were two other exceptions taken below, which will be found noted in the opinion of the Court.

Johnson, for Appellants.

Winans, for Respondents.

WELLS, Justice, delivered the opinion of the Court.

This was an action, brought by the plaintiff in the Court below, to recover the value of certain doors, window-sashes, etc.

The property in question was seized, upon execution, in favor of defendant, Dunlap, against Solms and Hutchinson, and sold by the sheriff, by the express orders of the defendant, Dunlap. The property, it is alleged, belonged to the plaintiffs, and Dunlap was notified of the fact at the time of the sale. Two trials were had in the Court below, and before the second trial, a deposition of George W. Solms, a witness on the part of the plaintiffs, was taken, before C. C. Sackett, a notary public, in compliance with an order granted by the District Judge. The defendant moved the Court below, at a special term, on the 3d day of April, 1852, in accordance with previous notice, to suppress the deposition of said Solms, upon the grounds of insufficiency of notice and irregularity; which motion the Court overruled, and the defendants excepted. The cause was tried, for the second time, on the 15th of April following, and upon the trial the deposition of Solms was offered and read in evidence. It is now insisted, that the Court erred in denying the motion, made at the special term, to suppress the reading of the deposition referred to; but we are of the opinion that the Court committed no error in this ruling. In the first place, the motion was prematurely made; the proper time to have objected to

the introduction of the deposition as testimony, was when it was offered in proof upon the trial; and the Court properly refused an order suppressing it, upon a motion made before the trial. In the next place, the granting or refusing such motion rested in the sound discretion of the Court, and the Judge was to decide whether the facts and circumstances alleged, relied upon to sustain the motion, upon the ground of insufficiency or defect of notice, were sufficiently established or *not; and it does not appear to us that in [97] deciding as he did, he, in the remotest degree, abused such discretion; besides, all the grounds of objection, as to the notice and the manner of taking the deposition, and the attestation thereof, are purely of a technical character, and none of them seem founded upon any substantial basis.

Dunlap was sufficiently notified, as was abundantly proved by Hyer, and the notice served upon him conformed substantially to the statute. (See Statutes of 1851, p. 118, secs. 428, 429, 430.) The slight error in the title of the cause did not mislead him, it not appearing that there was any other suit pending between the parties named; besides, a defective title does not operate to invalidate a notice. (Statutes of 1851, p. 134, sec. 531.) The certificate of the notary to the affidavit was sufficient: it was a substantial compliance with the form of the statute. By the 443d sec. of the Practice Act of 1851, every notary public has power to administer oaths or affirmations, and the attestation or certificate of the notary, that an affidavit was sworn to, or affirmed, and subscribed before him, is regular, although his seal is not affixed.

The next assignment of error is, that the Court erred in allowing an amendment of the complaint. Surely this point will not be insisted upon, in the face of the statute which gives the party the power to amend, under the Practice Act of 1850, without leave, and under the present act, upon leave granted by the Court. In this case, not only was the amendment made under the old act, but, as it appears, upon leave granted by the Court.

The other objection—to the effect that the case should not be suffered to proceed, because the jury fees of the first trial were not paid. The act of May 1st, 1851, respecting fees

(Statutes of 1851, p. 35,) did not take effect until May 1st, 1852. The act of 1850 still prevailed, and that did not allow fees to dissenting jurors.

Statutes of 1851, p. 39, sec. 21. Statutes of 1851, p. 48, sec. 72. Statutes of 1850, p. 421, secs. 17, 22.

And again, even if the act of May 1st, 1851, was in effect at the time of the trial of the cause, it was not made to appear that the fees had not been paid. From these considerations, and *upon a full examination of this case, we cannot arrive at any other conclusion than that the appeal is frivolous, and was taken for delay, and therefore order that the judgment of the Court below be affirmed, with costs and ten per cent. damages.

PAUL SINCLAIR and URIAH THOMPSON, Respondents, v. J. C. WOOD and DANIEL C. WOOD, Appellants.

¹ EVIDENCE, INCOMPETENT TO PROVE PARTNERSHIP.—It is error to admit evidence to prove partnership by general reputation.

IDEM, PRELIMINARY PROOF REQUIRED.—It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents.

APPEAL from the Third Judicial District.

This was an action brought for the recovery of the value of a quantity of potatoes, sold by plaintiffs to defendants, as partners, on the 28th September, 1851, alleged to be of the value of \$1925 50, of which plaintiffs admit payment of \$941 18, and claim the balance of \$984 40. The payment admitted was made in *gunnybags* (so called.)

The summons was returned "served on J. C. Wood;" "defendant D. C. Wood, not found."

J. C. Wood answers, and denies the facts stated in the complaint, and specially denies that there is any balance or any sum due from defendants to plaintiffs, and by way of objec-

¹ Cited, *Hudson v. Simon*, 6 Cal. 455.

tion to the complaint further says, that the said plaintiffs are not the real parties in interest, and that there is a defect of parties, and prays judgment, etc.

The demurrer was afterwards withdrawn, and the cause tried by a jury, who found for plaintiffs, \$984 40; and judgment rendered accordingly, from which defendants appealed, and also from the order refusing a new trial, which had been moved by defendant.

In the course of the trial a witness (Clough) was called, who swore that defendants were *reputed* to be partners in purchasing and selling produce; that witness run a brig in September *and October, 1851, of which J. C. and [99] D. C. Wood were the reputed owners; that J. C. Wood had paid witness as master of the vessel; that plaintiffs had sold a quantity of potatoes to D. C. Wood, which was delivered by the brig. Did not know that credit was given to D. C. & J. C. Wood. J. C. Wood paid witness as master of the brig; witness had carried letters and money from J. C. to D. C. Wood; brought down in September and October, 1851, \$1000, of which sum \$200 were paid for the potatoes purchased of plaintiffs.

J. C. Wood did the business of the vessel as consignee, whose duty it was to pay the officers and men. D. C. Wood was master of the brig before witness took her. J. C. was the consignee of the cargo. Defendants are brothers.

Another witness swore that he had seen letters brought by last witness, and delivered to D. C. Wood at witness's house, in September and October, purporting to be from J. C. Wood—and so stated by Clough—to D. C. Wood. D. C. Wood while at witness's house had received letters purporting to be from his brother J. C. The letters were left at witness's house, who after looking at them destroyed them. The letters brought by Clough (the former witness,) instructed D. C. Wood to buy potatoes at a certain price, and keep the vessel running. The proof of the letters was objected to on the ground that there was no proof that they were written by J. C. Wood. The objection was sustained by the Court, except at to the letter delivered by Clough, which was admitted, to which exception was taken by J. C. Wood's counsel.

On cross-examination, the witness said one of the letters brought by Clough, referred to \$1000 sent by Clough to pay for some potatoes D. C. Wood had bought; does not know whether before or after the purchase from plaintiff. The two Woods were represented to be partners in the brig, as well as in the purchase and sale of produce.

Some further testimony of like character was given, when the evidence of the case was closed; and J. C. Wood's counsel moved for a nonsuit, as to him, on the grounds that no liability was shown, as to him, nor no evidence of partnership [100] ship between *him and D. C. Wood, so as to charge him with the acts of the latter; which the Court overruled, and defendants excepted.

The case was given to the jury, and the verdict and judgment were rendered, and this appeal taken, as stated above.

Hackett and Judah, for Appellants.

Whitney and Gregory, for Respondents.

For appellants, it was argued that general reputation was not admissible as evidence of a partnership; or, if admissible, not sufficient. (Collyer on Partnership, sec. 777, p. 676; 20 Wend. 81; 3 Hill, *Smith v. Griffith*.)

The admission of the contents of letters, to prove a partnership against J. C. Wood, which were not shown to be his, but only said to be, was error.

The admission of illegal testimony, in the least degree bearing upon the merits of the case, if objected to, is error. (1 Comst. 521.)

There is no brief for respondents on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Evidence was allowed on the trial to prove a partnership by general reputation.

The contents of letters were also permitted to be given in evidence, without proving that they were written by the party who was to be charged by their contents.

These errors are so manifest, that their statement alone is

sufficient to show that the judgment in this cause must be reversed, and the cause remanded.

Ordered accordingly.

***ALFRED GODFREY, Respondent, v. ROGERS [101]
and CALDWELL, Appellants.**

MORTGAGE, INTEREST, RATE OF.—Where the assignee of a mortgage upon premises, the buildings upon which were destroyed by fire, agreed to waive his lien in favor of one who had agreed to advance money to rebuild, but no agreement was made at the time as to interest: *Held*, that the guarantee of the assignee extended no further than the contract when made, and as this was silent as to interest, that a higher rate of interest than the law allowed, where the rate was not agreed upon by the parties, could not be allowed.

APPEAL from the Fourth Judicial District.

This case, as originally decided, will be found reported in 2d California Reports, 489, where the facts are detailed, and to which we refer. It will be there seen that W. G. Wells, the assignee of a mortgage on the premises described, (the buildings upon which were destroyed in the fire of 4th May, 1851), covenanted to waive his lien in favor of Rogers, who had agreed with Caldwell, the grantor in the mortgage, to advance funds to rebuild the premises. The present plaintiff is the assignee of Wells, and had notice of this agreement. Rogers advanced the funds, accordingly, and the advance so made, was allowed to him as an equitable lien.

The question presented to the Court in the present case is, whether or not Rogers was entitled to five per cent. interest, as against the mortgage, claimed by him upon his advance. This was resisted on the ground that there was no agreement in writing fixing the interest, and that therefore the claimant was entitled to no more than the ten per cent. which the law allows when the parties do not agree upon a different rate.

It was in evidence that Caldwell had verbally agreed to the charge of five per cent. per month after the advances had been all made, but there was none showing the assent of Mills, his assignee, or of the plaintiff, assignee of Mills.

Hambley, for Appellants.

McAllister, for Respondent.

[102] *HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

When this cause was here before, the claim of Rogers was allowed as an equitable lien, because he had been induced to advance the money by Wells, the holder, and subsequently the assignor, of the mortgage. But the guarantee of Wells extended no further than the contract then made, or about to be made, between Rogers and Caldwell.

The evidence disclosed no contract for interest until after the advances had been made and an account of them rendered. In this account, Rogers charges Caldwell five per cent. per month, and Caldwell assents to it. Now, although it is true, that as against Caldwell, this charge for interest may be enforced, yet it cannot enter into the equity of Roger's claim for advances which are held a prior lien to Wells's mortgage.

Wells guaranteed alone for the advances, as they were agreed on, or contemplated, at the time. It would be inequitable to allow any subsequent contract, for a heavy rate of interest, to partake of the guarantee, and such a rule would always leave the guarantor unprotected against collusive agreements.

Judgment affirmed.

[103] *WEBB, Respondent, v. HANSON, Appellant.

JUDGMENT, NOT SUBJECT TO COLLATERAL ATTACK.—The Court of Sessions granted a license to defendant to run a ferry. This grant was resisted by plaintiff, who took an appeal to the District Court, who affirmed the grant; which judgment remained unreversed. This action was brought to recover damages from defendant for running the ferry; the plaintiff alleging that the license was illegally granted. *Held*, that the judgment of the District Court was a bar to this action, and that that judgment could not be impeached collaterally.

APPEAL from the Tenth Judicial District, for Yuba County.

The plaintiff, Hanson, claimed damages of defendant, to the amount of \$8500, for that defendant, between the 1st of March, 1852, and the 1st April, succeeding, run a ferry across Feather River, near Yuba City, within one mile of a ferry, regularly licensed by the Court of Sessions of Yuba County, belonging to plaintiff, to the damage of plaintiff, etc.

The answer of Webb, the defendant, admits that he did run a ferry across Feather River, as stated in the complaint, but avers his right to do so, under a license granted to him on the — day of May, 1851, by the Court of Sessions of Yuba County, for the period of one year from that date.

The plaintiff filed an amended complaint, in which he charged that Yuba County had aided the defendant to do the damage, etc., inasmuch as the damage was done under a license wrongfully issued by the Court of Sessions of said county, to the defendant; and prays that Yuba County, through its District Attorney, be cited to appear, and answer, etc. A citation issued 12th June, 1852, and was returned, "served on H. P. Haun, District Judge of Yuba County."

In his amended answer, Webb admits Hanson's right to run a ferry, as stated in his complaint, but denies his right of action against him, and then proceeds to set out his application for a license to the Court of Sessions, on the 22d May, 1851; the grant of the same for one year, under which he run the ferry; that Hanson appealed to the District Court of Yuba County, from the said order of Sessions granting the license to him, Webb; that the appeal was tried by a jury, who found in favor of *Webb and, against Hanson, and [104] judgment was rendered by the Court, in conformity thereto, which judgment still remains in full force, and unreversed. That on the 16th June, 1851, Hanson appealed to the Supreme Court, who affirmed the judgment of the District Court, on the 21st February, 1852, and that the said appeal was dismissed, and judgment for costs rendered against Hanson, and the Supreme Court denied a rehearing of the cause on the application of Hanson.

That on the 21st April, 1852, Webb applied to the said Court of Sessions, for a renewal of his license, which the said court granted, from the 22d May, 1852, for one year, and

which is still in full force, and he continues to run a ferry under the same, and that all the grievances complained of by plaintiff, were done by the defendant, under said license.

The cause came on for trial in the District Court, 12th July, 1852, and the court ordered that the same be dismissed as to Webb, and gave judgment for costs against Hanson.

The plaintiff filed the following exceptions to the ruling of the court.

1. That the court dismissed the action upon the ground, that the order granting the license, by the Court of Sessions, having been affirmed by the District Court, upon appeal from the Sessions, and that this judgment remaining unreversed, was a bar to this action.

2. That the Court refused to permit the plaintiff to show that the license of defendant was null and void, and that the Court of Sessions had acted without authority.

3. And refused to allow plaintiff to show that the District Court had erred in affirming the license issued by the Sessions.

Walker, for Appellant.

The order granting a license is not a judgment of court; but if the order of the District Court, affirming the license to Webb, be a judgment, it would be proper to show in this action, that the license was improperly granted. If it were issued without the notice required by the statute, it would be void. But the District Court, by dismissing this action, cuts off such proof. If a judgment be rendered without summons, or complaint filed, a sale made under it will be set aside.

[105] *A license is in the nature of an appointment to office, and not of a judgment. (2 Hilliard, on Real Prop. chap. 63, sec. 16, p. 49, 2d edition.) If allowed to show a judgment void, *a fortiori* a ferry license.

———, for Respondent.

There being no allegation of fraud, the decision of the District Court cannot be attacked collaterally, and was a bar to this action.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The assignment of error relied on, is that the plaintiff failed to show that the Court of Sessions had jurisdiction to grant the ferry license, inasmuch as some of the requisitions of the statute had not been complied with.

It appears, however, that the defendant had resisted the grant of license, and taken an appeal to the District Court, where there was had a trial *de novo*, and an affirmance of the decree of the Court of Sessions.

The District Court is a superior court of general jurisdiction, and its judgment upon any subject within its power, must be held as conclusive between the parties in every collateral issue, as long as such judgment is unreversed.

It results, that there was no error in the Court below refusing to permit its former judgment to be impeached; and the judgment is therefore affirmed.

***THE PEOPLE, Respondents, v. JUAN NAVIS, [106]**
Appellant.

ADMISSIONS OR CONFESSIONS AS EVIDENCE.—In a trial for murder, where the admission or confession of the party was resorted to as evidence, it was held to be error to exclude any portion of it, made at the same time with that portion of it which was admitted.

APPEAL from the District Court of the Fifth Judicial District for Calaveras County.

The defendant was indicted for murder, at the February Term of Calaveras County, for killing an Indian, found guilty, and sentenced to be hung.

A witness was called for the People, in the course of the trial, who, on his direct examination, swore that "the defendant came to him on the evening that the Indian was killed, with a knife in his hand, and stated that he had killed the Indian."

On the cross-examination of the witness, he was asked the

question, "What also did he, the defendant, say at that time?" To which question the counsel for the People objected, and the question was overruled by the Court. The defendant's counsel excepted.

This appeal was taken from the judgment and sentence as above stated.

Yale and Perley, for Appellants.

The confession of defendant must be taken together. (1 Phil. Evid. 398-9; 1 vol. Notes, p. 342, note 214; p. 343, Ib. 1 vol. Notes, p. 421, note 252; 1 Greenl. Ev. 214; see 218, and authorities; 9 Leigh, 671; Pick. 308; 1 Dall. 240; Ib. 392.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Where the admission or confession of a party is resorted to as evidence, it is error to exclude any portion of it made at the same time as the part which is related.

For this reason, the judgment is reversed, and a new trial ordered.

[107] *CHARLES B. SAMPSON, Respondent, v. F. M. SCHAFFER, Appellant.

JUROR, QUALIFICATION OF.—To render a person competent to act as a juror, he must be an elector of the county in which he is returned, and have resided in the county thirty days.

APPEAL from the Tenth Judicial District, for Yuba County.

The facts upon the only point considered will be found fully stated in the opinion of the Court.

Field, for Appellant.

Berry, for Respondent.

The opinion of the Court was delivered by WELLS, Justice. HEYDENFELDT, Justice, concurred.

The defendant in the court below moved for a new trial, and assigned as one of the causes on which the motion was based, an error in the law occurring at the trial, and excepted to by him. The particular error is set forth in the statement, which is a part of the record, as follows: In the formation of the jury, one Charles Reed was called, and the Court asked the counsel of the respective parties, if they had any objections to him as a juror; whereupon he was examined by the defendant's counsel, and upon such examination he stated, that he was at present a resident of Marysville, Yuba County; that he came to Marysville to reside nine days ago, and previous to that period, he had resided in Battle County. Thereupon, the defendant's counsel objected to said Charles Reed as a juror; but the Court overruled the objection, and the defendant's counsel excepted to the ruling of the Court. (Act concerning Jurors, sec. 1, Statutes of 1852, page 107.)

According to the statute, a person shall not be competent as a juror, unless "an elector of the county in which he is returned." To be an elector of a county, a person must be a resident within it for thirty days. (Constitution, Art. 11, sec. 1; Act to regulate elections, sec. 10; Statute of 1850, p. 102.)

Reed was not an elector in Yuba County, where the trial was *had, and in which he was returned, and was [108] therefore incompetent to serve as a juror.

It was a good objection, and the defendant was not obliged to resort to his peremptory challenge. The exception to the ruling of the Court was well taken, and the new trial should have been granted. The order denying the motion is reversed, with costs, and a new trial is ordered.

NOTE.—An elaborate opinion has been prepared by me upon the propositions embraced in the appeal from the judgment of the Court below, involving various other and important questions of law arising upon the trial; but not being successful in convincing my learned associate of the correctness of my conclusions upon them, no decision will be rendered thereon.

CAVILLAUD, Respondent, v. YALE, Appellant.

ATTORNEY, ACTION AGAINST FOR NEGLIGENCE.—In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained. But if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error.

IDEM, RIGHT TO RETAINING FEE.—An attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary.

APPEAL from the Tenth Judicial District, for Yuba County.

The complaint alleges that plaintiff had retained and employed the defendant as an attorney and counsellor of the Supreme Court, to prosecute and conduct a certain appeal in said court (describing the case,) for certain reasonable fees and rewards therefor, to be paid by the said plaintiff to the said defendant, and avers that the said defendant then and there accepted and entered upon such retainer and employment. But the defendant did not and would not prosecute the said appeal in a proper and skilful manner, but wholly neglected the same and his duty in the premises, and abandoned the same without any notice to the plaintiff, by [109] means of which plaintiff was *prevented from having a hearing before the Court, and the said appeal, by reason thereof, was dismissed, whereby the plaintiff had judgment rendered against him, etc., and hath damage to the amount of \$5000.

Defendant demurred, for cause, that the complaint of plaintiff does not show that the plaintiff ever paid, or that defendant ever received, any money in the way of compensation or reward for the defence of said plaintiff in the said case of appeal in the Supreme Court, as set forth in the complaint, whereby the defendant was bound in law to attend to the said cause.

Several other causes of demurrer were set forth by the defendant, but the one stated was the only one considered by the Court.

The District Court overruled the demurrer, and defendant took this appeal.

Field and Townsend, for Appellant.

The payment of a fee must be regarded as a condition precedent to the performance of a contract as a counsellor, in the absence of all express stipulations to the contrary. In this respect, the contract with a counsellor differs from the common contracts for labor. At common law, the counsellor could maintain no action for fees; no obligation, therefore, could attach upon him without payment. Plaintiff therefore was bound to allege payment, or an offer to pay. (Chit. on Cont., ed. of 1848, 572.)

At common law, no action could be maintained for negligence against counsel: at the time of the alleged contract, there was no statute in the State in relation to the fees or contracts of counsel. (Old Prac. Act, sec. 225; New Prac. Act, sec. 494.)

Sweeney, for Respondent.

The declaration may be without any inducement, and may commence with a statement of defendant's retainer, without stating any consideration, and need not state the consideration of the retainer. (Note to 2 Chit. Plead. 172, 272, 372; 2 Chit. Rep. 311; *Brown v. Diggles*, 18 Eng. Com. Law Rep. 548, 9; 5 T. R. 145; Pick. 237; 4 J. B. Mass. 532.)

The only cases against this doctrine are those that do not show the capacity in which the party undertook it, and for that *reason the courts have held that an allegation [110] of consideration was necessary. But where the party is shown to have undertaken as counsellor or attorney, no allegation of consideration is necessary. (4 Bar. and Cress. 10 Eng. Com. Law, *Dartnell v. Howard*. See, also, 2 Lord Raymond, 919, 20, *Coggs v. Bernard*.) An attorney retained cannot abandon a cause for want of funds without reasonable notice. (3 Barn. & A. 340; Eng. Com. Law, vol. 23, p. 91.)

If an attorney request to have his fees paid, he is not bound to proceed unless they are paid. (9 Con. 59.)

In *Carle and Wife v. Bennett*, a motion was made to compel the attorney of plaintiff to proceed in the suit. In this case considerable costs had accrued, and the attorney refused to

proceed *until they were paid*. The Court held, that the attorney is not to go on in spending money for his client without being secured. (2 Johns. 296.)

In the above cases it is nowhere intimated, that without notice to his client, a demand of payment, or security for his fees, that an attorney may abandon the cause; the cases turn upon the facts of notice, demand, and refusal, and the allegation in this complaint is, that the defendant, without notice, etc., to plaintiff, abandoned, etc.

The rule from all the decided cases may be deduced, that, "an attorney who has once undertaken and commenced a suit for his client, is bound to continue it; that a bare omission to furnish the necessary funds will not justify an abandonment." (Mordecai v. Solomon, Sayer's Rep. 173; 23 Eng. Com. Law Rep. 317; and see Johns. 296.)

The allegation of payment was not necessary by plaintiff. (7 Bing. 413; 20 Eng. Com. Law Rep. 183; 2 Chit. 311.)

The opinion of the Court was delivered by **HEYDENFELDT**, Justice. **WELLS**, Justice, concurred.

The demurrer to the declaration was well taken. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained, without stating specially that a retaining fee was paid. But the averment here goes further, and shows that the employment or [111] engagement of the defendant *was in consideration of certain reasonable fees and rewards to be paid him. No future time is stated as having been agreed upon for the payment of the fee, and the inference must be, that it was to be paid before the services were rendered, because an attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. Therefore, the declaration averring that the fee was to be paid, should also have averred the payment, as distinctly as the performance of any other condition precedent is necessary to be stated.

Judgment overruling demurrer is reversed, with costs.

BROWN, Respondent, v. BROWN and GROVES, Appellants.

FINDINGS, FACTS AND CONCLUSIONS HOW STATED.—The Court below, sitting as a jury, must find *separately* the facts and conclusions of law. A verdict insufficient in this particular will be reversed.

IDEM, RULE WHEN NOT TO APPLY.—But this rule does not apply to a judgment by default against one defendant, where there are two, and the other goes on to trial.

APPEAL from the Superior Court of San Francisco.

This was an action brought by the plaintiff to recover of defendants two promissory notes, set forth in the complaint. One of defendants, Brown, made default, and judgment was entered against him accordingly; the other, Groves, went on to trial; but as the cause went off on grounds distinct from the facts of the case, a further report of them is deemed unnecessary.

The opinion of the Court was delivered by MURRAY, Chief Justice.

This cause comes within the rule laid down by us in *Russel v. Armador*,¹ in which we decided that the Court below, sitting as a jury, must find separately the facts and conclusions of law. The verdict of the Court in the present case is insufficient. This rule, however, is not intended to apply to judgments by default.

Judgment reversed as to Groves, and new trial ordered; judgment as to Brown affirmed; costs to abide the event.

***WINGATE, Respondent, v. BROOKS, Appellant. [112]**

UNDERTAKING, ON CLAIM AND DELIVERY.—Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it.

APPEAL from the Sixth Judicial District, for Sacramento County.

This action was brought upon a replevin bond, taken by

the sheriff of the county, and by him duly assigned to the plaintiff.

After plaintiff had rested his case, the defendant, by his counsel, moved for a nonsuit, on the ground "that the bond is made payable to the sheriff, and not to the plaintiff; that it is not a statute bond, and is not assignable."

Two other grounds of nonsuit were alleged, which were not considered, for the reasons stated in the opinion of the Court.

Latham and Morrison, for Appellant,

Referred to Statutes of California, 2 Session, p. 65, sec. 102; 6 Barb. Rep. 173; 4 Wend. Rep. 616; 2 Mass. 517.

Winans, for Respondent.

A bond, though taken to the sheriff as such, may be assigned by him to the creditor, who may maintain a suit thereon. (1 Munf. 76; Stat. California, 1850, ch. 121, sec. 2.)

The blank endorsement and delivery of a bond gives the assignee the right to sue upon it in the assignor's name, and (under our statute) in his own name. (3 Gill. & J. 214; Cal. Statutes, 1850, ch. 5, title 1, sec. 4, p. 51; 1 Paige, 41.)

Replevin bond may be assigned to a third person. (5 Lith. 289, Kentucky.)

HEYDENFELDT, Justice, delivered the opinion of the Court, WELLS, Justice, concurring.

This was an action on a statute bond, given to the sheriff, and by him assigned to the plaintiff.

At the time, the defendant moved for a nonsuit, which was refused, and the refusal is here assigned for error.

I think the nonsuit was properly refused. The first [113] ground *for the motion is not well taken. The bond seems to me substantially to conform to the requisitions of the act, and no variation has been pointed out.

The succeeding grounds are based upon the action of the Court in the case in which the bond was given. The errors of that case, if any, cannot be reviewed in this.

The judgment is affirmed, with ten per cent. damages and costs.

ALPHONSO BROOKS, Appellant, v. JOSEPH. H. LYON,
Respondent.

¹ **NEW TRIAL, ON GROUND OF SURPRISE.**—Where a slight degree of prudence would guard against surprise, it is not a sufficient ground to allege for a new trial.

² **IDEM, WHAT AFFIDAVIT SHOULD STATE.**—The affidavit did not state, that the newly discovered evidence was discovered since the trial, nor in what particular it would be material, nor what important fact it would tend to establish, nor that due diligence was used, nor why it could not with reasonable diligence have been discovered and produced at the trial of the cause. *Held*, that a new trial was properly refused.

APPEAL from the Fourth Judicial District.

This was an appeal, taken September 6, 1852, from a judgment of the District Court refusing to grant a new trial, upon the motion and affidavit of the defendant.

The insufficiency of the affidavit upon which the motion was based, was the only question considered in this Court. And its defects are particularly pointed out in the opinion of the Court.

McHenry, for Appellant.

No brief filed for respondent.

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The affidavit on which the motion for a new trial, on the ground of surprise and newly discovered evidence, was based, was insufficient.

From aught that appears to the contrary, the cause was noticed for trial in due form, and at a proper time, and was *placed upon the calendar for the trial of causes, [114] and called on for hearing in its regular order; and

¹ See generally, *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Packer v. Heaton*, 9 Cal. 571; *Fuller v. Hutchings*, 10 Cal. 526; *Patterson v. Ely*, 19 Cal. 29; *Spencer v. Doane*, 23 Cal. 420; *Rodriguez v. Comstock*, 24 Cal. 85; *Schellhous v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 33 Cal. 456; *Delmas v. Martin*, 39 Cal. 557.

² Cited, *Klockenbaum v. Pierson*, 22 Cal. 163; 3 Or. 43. See *Rogers v. Hule*, 1 Cal. 429; *Taylor v. Cal. Stage Co.*, 6 Cal. 228; *Brooks v. Douglas*, 32 Cal. 208; *Cass v. Codding*, 38 Cal. 194.

while there is nothing to show that the defendant was taken by surprise, except his own naked and unsupported allegation, it would seem that the exercise of the slightest degree of prudence on the part of himself or his attorney could have guarded against it.

The affidavit is equally insufficient to sustain the other ground upon which a new trial was asked. It does not show that the evidence claimed to be newly discovered, was discovered since the trial, nor in what particular such evidence was material, nor what important fact it would tend to establish, nor that due diligence was used, nor why it could not with reasonable diligence have been discovered and produced at the trial of the cause; all of which facts should have been affirmatively shown by the applicant. (*Daniel v. Daniel*, 2 J. J. Marsh. 52; *Graham on New Trials*; and *Bartlett v. Hogen*, ante 55.)

It is not pretended that the facts which it is alleged could be proved by the testimony of Taylor, constituted the newly discovered evidence relied upon, nor that any diligence was exercised to obtain his evidence, either through an application for a commission to take his deposition or otherwise. We are therefore of opinion, not only that the Court below properly refused the motion, but that the appeal is entirely without justice, and frivolous, and, as appears to us, was only made for delay.

The judgment of the Court below is affirmed, with costs, and ten per cent. damages upon the amount of the judgment, to be added to said amount when ascertained.

***T. D. BURNHAM, Appellant, v. JOHN C. HAYS, [115]
Respondent.**

COSTS, AMENDMENT TO BILL OF.—Under the 68th sec. of the Practice Act, the Court have power in the exercise of its discretion to allow the amendment of a bill of costs, and the affidavit accompanying it.

IDEM.—Where the original bill of costs is filed within the time prescribed by the act, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part.

IDEM, REMEDY OF DEFENDANT.—If the original affidavit was a nullity, the defendant should have taken proper steps to set it aside, or have appealed from the judgment, on the ground that the costs had been waived by operation of the statute.

IDEM, POWER OF COURT.—But where the defendant himself moved a retaxation of the costs, it was proper for the Court, in its discretion, to allow such amendments as were just and necessary.

IDEM, AFFIDAVIT, SUFFICIENCY OF.—The affidavit by the attorney of the party accompanying the bill of costs is good under the statute.

1 STATUTORY CONSTRUCTION.—In construing a statute, the sections must be taken together, and that interpretation should be placed upon the language, which will give the particular section utility and effect, make it compatible with common sense, and the plainest principles of justice.

APPEAL from the Superior Court of the City of San Francisco.

The cause upon which the question of costs (which was the only question presented to the Supreme Court,) arose, was tried on the 5th May, 1852, and a verdict rendered for the plaintiff, for \$4000, upon which judgment was entered on the same day for the amount of the verdict, and costs and disbursements incurred by the plaintiff in his action amounting to \$409 80.

On the 6th May, a bill of costs was filed, corresponding in amount to the above sum of \$409 80, to which was appended the following affidavit:

“State of California, County of San Francisco.

“G. W. Beck, being duly sworn, deposeth and saith, that the above bill of costs is true and correct to his best knowledge and belief; and further deponent saith not.

“G. W. BECK.”

¹ In general, cited, *Oullerton v. Meead*, 22 Cal. 98; *Cormerais v. Genella*, 22 Cal. 125. See *San Francisco v. Hazen*, 5 Cal. 169; *Taylor v. Palmer*, 81 Cal. 241; *People v. White*, 34 Cal. 183; *Nicolson P. Co. v. Painter*, 35 Cal. 708.

[116] *"Sworn and subscribed before me, the 6th May,
1852.

"E. W. TAYLOR, Notary Public."

On the 22d May, a motion was made by defendant to retax the bill of costs, of which notice had been given to plaintiff's counsel on the 17th, which was argued by counsel, and on the 26th May the Court ordered, that the counsel of plaintiff have leave to amend his bill of costs and affidavit, and on the same day the attorney for plaintiff filed an amended bill of costs, and delivered the same to the clerk, with the affidavit of G. W. Beck, taken on the same day.

The bill as amended reduced the amount \$20, leaving the amount claimed \$386 80, which was taxed accordingly, by order of the Court.

The affidavit annexed to the above bill was as follows:

"State of California, County of San Francisco.

"G. W. Beck, one of the attorneys of the plaintiff above named, being duly sworn, deposeth and saith, that the items of the foregoing bill of costs are correct, to his best knowledge and belief, and that the disbursements have necessarily been incurred in the action. And further saith not.

"G. W. BECK."

“Sworn to and subscribed before me on the 26th May,
1852. H. MARSHALL, Clerk.”

On the 31st May, the defendant appealed from the order of Court of the 26th May, granting leave to plaintiff's counsel to amend the bill of costs, etc. Affidavit filed on the 6th May.

This case had been originally heard at January Term, but a rehearing having been granted, it came again before the Court at this term.

Burham and Reed, for Appellants.

Read the 5th section of the Practice Act of 1851: "The memorandum (of costs) shall be accompanied by the affidavit of the party that the items are correct, to the best of his knowledge and belief, and that the disbursements have been

necessarily *incurred in the action. The memoran- [117]
dum and affidavit shall be delivered to the clerk within
twenty-four hours after the rendition of the verdict, or the
costs shall be deemed waived."

The original bill was not accompanied by the affidavit of
the party, who alone could make it; nor does the said affi-
davit set forth, that "the items" in the said bill of costs are
correct, to the best of the knowledge and belief of the party,
nor that the disbursements had been necessarily incurred
in the action; for which defects the costs were, and ought to
be deemed "waived."

Neither is the amended bill of costs accompanied by the
affidavit of the party, and for this cause it should be deemed
"waived."

Where an act requires a thing to be done in a particular
way, that way alone must be pursued. (*Bell v. Morrison*, 1
Pet. 355; U. S. Dig. vol. 2, p. 809, citing 3d Brev. 396; 5
Wend. 136.)

When a thing is to be done within a specific time, the
Court cannot enlarge that time. (See 5 Wend. 136.)

If a statute designates a person by whom a thing shall be
done, it can be done by no other.

The statutes of California, in every instance where an oath
may be made by a person *other than the party*, expressly au-
thorize some other person to make it. (See sec. 55 Practice
Act, 1851; sec. 75 same act; sec. 100 same act; and secs. 113
and 121 of the same act.) In this case there is no such pro-
vision, and the party alone could make the oath under the
statute. (See also rule of the Superior Court, 16.)

The original affidavit was sworn to before an attorney of
the defendant in the cause, and should have been rejected.

Clark, Taylor, and Bickle, for Respondents.

The original bill of costs was excepted to by defendants,
who moved to retax the costs. The Court ordered the retax-
ation, and allowed the amended affidavit as incident thereto.
Whether the bill and affidavits, as original or amended, were
regular or legal, is not for this Court to inquire.

The power to grant amendments is expressly given by the Practice Act, sec. 68. "The Court may amend any [118] proceeding *by correcting a mistake in any respect."

The plaintiff by mistake had sworn to a trifling item of costs too much, and the Court allowed the mistake to be corrected, and the affidavit to be amended accordingly, thus benefiting the defendant by the reduction.

The appeal does not "affect a substantial right," and therefore does not lie. (See stat.)

But, 1st. All amended pleadings date from the time of filing the originals. 2d. The statute requiring the party to make the affidavit should receive a rational construction. In half the actions brought, the party himself could not make it. He may be absent, or resident abroad, and besides, the attorney almost always makes the disbursements, and their amount is known only to him. To require the party to swear personally to these, would be contrary to the views which the courts have taken of the statute. 3d. The attorney who administered the oath was also a notary. His being attorney for the party does not annul his official act as notary.

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

Upon an examination of this case, on rehearing, I am satisfied that the decision heretofore rendered by this Court by my associates was correct, and should be adhered to.

The Court below, in allowing the plaintiff to amend his bill of costs, and the affidavit accompanying it, exercised a legal discretion which it was competent for it to do, by virtue of the 68th section of the Practice Act, and the defendant cannot say that such discretion was abused, inasmuch as it resulted to his benefit by the reduction of the amount of charges against him. Nor can it be said that the allowing of such amendments was an enlarging of the time fixed by statute for the delivering of the memorandum and affidavit to the clerk. The original memorandum and affidavit were delivered within the time specified, and the filing of the amendments related back to the time of filing the originals, of which they merely

formed a part. This was not an enlarging of the time such as was contemplated by the *decision in the case [119] cited from 5 Wendall, and therefore the rule in that case does not apply.

If the original affidavit was a nullity, and the defendant intended to take advantage of it, he should have treated it as such, and have taken proper steps to set aside the judgment, or appealed therefrom, on the ground that the costs had been waived by operation of the statute; but having moved for a retaxation of the costs, and the bill being, upon his own motion, before the Court for that purpose, it was proper that such order should be made, and such amendment allowed, as in the discretion of the Court was just and necessary in the premises.

It is objected that the amended affidavit is equally void, it not having been sworn to by the party, as required by the statute, but by one of his attorneys, and we are referred to several other sections of the Practice Act, to show, that in every instance where an oath is not made by the party himself, the statute expressly authorizes some other person to make it; but this fact, instead of sustaining the objection, affords a good reason why, in this instance also, the affidavit may be made by some person other than the party, by his attorney, or some one else, in his behalf, who had knowledge of the facts. In construing the statute, we must consider the sections together, and that interpretation should be placed upon the language which will give the particular section utility and effect, and which at least will make it compatible with common sense and the plainest dictates of justice. Such a construction as the defendant would have placed upon it would render this section in most cases impracticable; in many, unjust; in some, inoperative and nugatory, and in all, inconvenient. It would deprive an absent or non-resident party entirely of his right. Indeed, it would operate as a denial of such right to every party, unless he was prepared to swear to a bill of costs, of the correctness of which he could seldom by any possibility have the remotest personal knowledge. The fees and disbursements expended in the preparing of a cause for trial, and in the trial and general manage-

ment of it, are almost universally paid out by the attorney; and how can another party be supposed to know what amounts are thus paid? It would be a novel thing to require a [120] party in all cases to swear to the *correctness of the items of his attorney's bill of costs. Such a thing was never required by any law that was ever heard of before, and such as I cannot admit was intended by any legislator in his senses who had a voice in framing the act under consideration.

RICHARD LUPTON, Appellant, v. CHARLES B. LUPTON, GEORGE D. LOBATER, L. CUNNINGHAM, and M. BRUMAGIM, Respondents.

DEBTOR, ASSETS OF ABSENT DEBTOR.—To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law.

¹ **CREDITORS, LEGAL AND EQUITABLE RIGHTS OF.**—If the bill discloses such remedy at law, it will be dismissed upon demurrer.

APPEAL from the Tenth Judicial District.

The complainant alleges that he did work and labor for defendants, as partners, under the firm of Lupton and Lobater, from 10th March, 1850, until 1st February, 1851, at \$100 per month, amounting to \$——, which is due from said Lupton and Lobater.

And in another count, claims \$2000 for work and labor done for defendants, etc., who have not paid, etc.

That about the 1st March, 1851, Lupton and Lobater dissolved partnership, having at that time a large amount of debts, of a doubtful character, due to them from various houses; that Lupton gave to the said Lobater his three notes, due at eight, twelve, and sixteen months from said 1st March, the first two for \$450 cash, and the last for \$400, on settlement of the partnership accounts, which are to be paid from

¹ Relief in equity when not obtainable commented on, *Hager v. Shindler*, 29 Cal. 55. See *Dewitt v. Hays*, 2 Cal. 468; *Merrill v. Gorham*, 6 Cal. 41; *Bucknall v. Story*, 36 Cal. 71.

collections to be made of the debts due to the said firm; and that Lobater, shortly after obtaining the notes, went to the city of New York, where he now resides. That before Lobater left, he appointed Cunningham and Brumagim his attorneys, and left with them the three promissory notes for collection, given by Lupton to Lobater, which are still in their hands and have not been paid by said Lupton. That said notes constituted the whole of the property *of said Lobater in the State of California, and are [121] payable to said Lobater. And plaintiff avers that he is the principal owner of the same, and prays that said Lupton, Lobater, Cunningham, and Brumagim, be made defendants to this complaint, and answer the same; that notice be published as to Lobater; the amount due to the complainant ascertained; and that any amount found due to the said Lobater on said notes may be appropriated according to equity in discharge of the amount found due to complainant, and that all the amount due to him may be paid out of the funds and property of said Lupton and Lobater, and for further relief, etc.

The defendants, Cunningham and Brumagim, demur to the complaint:

1st. Because no judgment was had on plaintiff's claim, and no attachment had issued thereon against the property of Lupton and Lobater, or Lobater alone.

2d. Because the action appears, on the face of the complaint, to be brought to recover, as well a claim arising on contract, as to specific personal property.

3d. Because the facts set forth do not constitute a cause of action.

The demurrer was sustained by the District Court, and the plaintiff appealed.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

This was a bill in equity to subject the assets of an absent debtor to the payment of the plaintiff's claim.

To entitle the plaintiff to this remedy, he must show that he is without a remedy at law. Instead of doing this, the

bill discloses that he has a perfect remedy at common law against the co-defendant Lupton, the joint debtor of Lobater.

The demurrer was therefore well taken, and the judgment of the Court below affirmed.

[122] *THEODORE PAYNE, Appellant, v. THE CITY OF SAN FRANCISCO, Respondent.

¹ PLEADING, OFFICIAL CAPACITY WHEN TO BE SHOWN.—To entitle a party to recover as Street Commissioner of San Francisco, he must show, not only that he had discharged his duties, but, 1st, that he had been lawfully elected; 2d, had qualified himself to hold the office, by taking the oath and filing the bond, at the time and in the manner required by law.

OFFICE, VACATED BY FAILURE TO QUALIFY.—The neglect of the plaintiff to qualify for the office within the ten days stipulated by law, after his election, was a refusal on his part to serve, and vacated the office, so far as he had any right thereto.

OFFICE, BEFORE WHOM TO QUALIFY.—Such qualification must be made before a proper officer, and cannot be made before the Mayor of the City, who has no power to administer the oath of office.

PUBLIC OFFICER, ACTION BY.—Nor will a joint resolution of the City Councils, approved by the Mayor, recognizing a party as Street Commissioner, enable him to recover for services rendered in that capacity, upon a *quantum meruit*.

APPEAL from the Superior Court of San Francisco.

The plaintiff claimed to be Street Commissioner of the said city, duly elected and qualified, and duly performing the duties of said office; that as such, he is entitled to a salary of \$4000 per annum, fixed by law, payable monthly by defendant; that he performed the duties of the said office for the month of March last, and became entitled to the sum of \$333 33 for said services, yet defendant, though requested, etc., had refused payment, etc.

The complaint also sets forth a claim for the value of plaintiff's services performed in behalf of defendant, at its special request, and for which defendant promised to pay, etc., but had refused, etc., and claims damages \$333 33 and costs.

¹ Statutory construction, time of performance of official act, cited, *Hart v. Plum*, 14 Cal. 155.

Defendant's answer denies that plaintiff was duly qualified, and had performed the duties of Street Commissioner, and denies that he is entitled to the salary claimed, or the sum of \$333 33, or any other sum for services, and denies generally the allegations of the bill.

It was conceded that the defendant was duly elected Street Commissioner in September, 1851, and it was proved that he took the oath of office before the Mayor of the City, and filed his bond on the 7th of January, 1852, which was approved by the Mayor.

*There was also proof, and so found by the jury, [123] that the plaintiff demanded of Mr. Divier, claiming to be Street Commissioner, the surrender of his books and office, etc., on the 9th of January, 1852; that the Common Council of the city, by a resolution passed the 26th January last, declared that the plaintiff be recognized as the Street Commissioner, and ordered that he proceed to the discharge of the duties of his office, and ordered him to do work from time to time, from the 7th January, 1852, to the 1st April, in and about repairing streets, etc., which he did, and had acted as Commissioner, doing the duties as such, from said 7th of January; that the city had paid him, for the months of January and February, the sum of \$333 33 per month; that payment for the month of March had been refused, and was still unpaid; and that he had performed his duty as Street Commissioner, by order of the Mayor and Common Council during the said month of March last, and that the services were worth \$333 33.

Mr. Divier, who claimed to be Street Commissioner, and of whom demand was made for the books, etc., by plaintiff, as above, had been elected antecedently to the plaintiff's election, and held over the office, on the ground that plaintiff had not duly qualified as required by law.

The District Court decided that plaintiff, not having taken the oath of office within ten days after the election, nor within ten days after the votes were canvassed and the result known, by the 15th section of Article IV. of the City Charter, such failure to qualify vacated the office. The qualification before the Mayor was a nullity. That the Mayor has no

authority to administer the oath of office to any person chosen or appointed to office by the authority of the State.

That the services performed by the plaintiff, by direction of the Mayor and Councils, do not entitle him to recover in this suit as Street Commissioner, for they are not authorized to create a Street Commissioner: this belongs to the qualified voters of the city alone, by election, at the time and in the manner pointed out by law.

And that William Divier, the previous Street Commissioner, continued the incumbent, and exercised his [124] duties until Jan. 7, *1852, without dispute, and could not then be ousted and another put in his place, except by impeachment and conviction; and while holding the office, the Mayor and Council had no authority to direct another to perform his duties.

Cooke, for Appellant.

The Councils are the agents of the city, and can bind it by contract. The Charter, sec. 13, art. 3, gives this power. The city is therefore liable for what these services are worth.

By article 4, sec. 16, of the Charter, the City Councils are to declare the result (of the election.) They have done this by resolution, and there is no evidence at what time the returns were made: the presumption is, they have conformed to the requirements of law.

This Court, in the case of *The People ex rel. Stephen Harris*, decides the question of qualification. Chief Justice MURRAY there says: "In relation to the failure of the relator to qualify within ten days after the election, I do not understand that there is any authority whatever to show that this necessarily vacates the office; this provision is merely directory."

The Mayor had power to administer the oath. (See Charter, art. 4, sec. 2, second subdivision; and see 3 Hill, 245.)

for Respondent.

To enable him to recover, the plaintiff was bound to show that he was an officer *de facto*, as well as *de jure*. (7 Sergt. & R. 386; 1 Dewees, 579; 2 Barb. 325; 5 Mass. 427; 9 Mass.

231; 23 Wend. 490; 1 Salk. 284; 2 Raw. 139-40; 1 Greenl. Ev., sec. 92-3, n. 1, 2.)

The Charter is express in requiring any person elected to a city office to qualify within ten days after his election; or, on failure, his office shall be deemed vacant. (See art. 2, sec. 6, of the Charter.)

The plaintiff took the oath before the Mayor on the 30th Dec., 1851; this was no compliance with the law. The oath should have been taken before a Judge of the Supreme Court, District, or County Court, or a clerk thereof, or Notary Public, or Justice of the Peace. (Act concerning offices, sec. 27.)

The Mayor has no power to administer official oaths. (2 Salk. *428; 2 Show. 67, note; 5 Mass. 427.) The [125] omission to qualify within the ten days is fatal to plaintiff's right. (Charter, art. 4, sec. 15; 20 Wend. 15, 16; 17 Wend. 85; 7 Sergt. & R. 386; 23 Wend. 490; 5 Mass. 427; 1 Salk. 284; 2 Salk. 429; 2 Show. 66, 7, and note, p. 67 and 475.) The absence of an oath as a qualification, within a specified time, is fatal. See the above authorities, and Cowp. 536; 12 Mod. 601; 5 Mod. 317.

Mr. Divier was the officer previously elected to Sept. 3, 1851, and was duly qualified, and had a right to hold over until his successor was qualified. (Charter, art. 4, sec. 16; 9 Paige, 511; 18 Wend. 518.)

If not the lawful Commissioner, plaintiff cannot recover for the services rendered by him. They were rendered as Street Commissioner, and belonged to that office, and for which a salary was fixed, and this is the only compensation provided by law; and this belongs to the lawful officer. (3 Sand. 263, and cases cited.)

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

To entitle the plaintiff to recover in the court below, it was incumbent upon him to show, not only that he had discharged the duties of the office of Street Commissioner for the month of March, 1852, but, *first*, that he had been lawfully elected; and *second*, that he had qualified himself to hold the office,

by taking the oath, and filing the bond, at the time and in the manner required by law.

The validity of his election is conceded. The election took place on the 3d day of September, 1851, and the plaintiff took the oath of office before the Mayor of the City of San Francisco, on the 30th day of December following, and filed his bond on the 7th of January, 1852. Was this a compliance with the requirements of the law?

The Charter of the city provides (art. iv., sec. 15,) that, "If any person elected to a city office shall remove from the city, absent himself therefrom for more than thirty days, *or shall fail to qualify within ten days* after his election, his office shall be deemed vacant."

This provision we regard as being peremptory and [126] positive in its terms. It differs essentially from those provisions of law which are construed by the Courts as being merely directory; and it does not come within the rule established by this Court in the case of *People, ex relatione Harris v. Brenham*.

Harris qualified within ten days after the result of the election was certified by the county clerk, and the decision of the Court was in reference to the time of declaring the result and the issuing of the certificates. The relator could hardly have been said to have been elected until the returns were made out, and the certificate issued, and the statute is regarded as merely directory as to the time of making such return, and issuing the certificate; neither does it come within the rules of the authorities cited in *The People v. Allen, Sheriff, etc.*, 6th Wendall, 486, and *Exparte Heath and Others*, 3 Hill, 42. It is admitted to be well settled as a general rule, that where a statute specifies the time within which a public officer is to perform an official act, regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed, or the language of the legislature shows, that the designation of the time was intended as a limitation of the power of the officer; thus, where an act requires a sheriff to file a certificate of sale within ten days, his omission or neglect to do so within the specified time does not affect the validity of the sale; and where a statute re-

quires an act to be done by an officer within a certain time for a public purpose, though he neglect his duty by allowing the precise time to go by, if he afterwards perform, the public shall not suffer by the delay. An election is not rendered void by reason of the inspectors failing to make the returns within a specified time, nor will an assessment be invalidated by the omission of the assessors to assess the tax within a particular time. There is a broad distinction, however, between these cases and the one at bar, wherein the act to be performed was not an official act regarding the rights of others; nor was it for a public purpose, nor one in which the parties could suffer from the delay: it was not to affect the rights of third parties, but his own right. It affected him, the officer, his rights and duties: it came within the exception: the nature of the act to be performed, and the language used by the legislature, showing that the designation of the *time was intended as a positive limitation; and [127] after having been declared duly elected by the proper officer, the plaintiff has no choice but to accept or forfeit the office. His neglect to qualify within the ten days was a refusal on his part to serve, and vacated the office, so far as he had any right or claim thereto. This position is sustained in *The People, ex relatione Platnar v. Jones*, 17 Wend. 81, and cases cited, besides numerous other authorities.

Not only did the plaintiff fail to qualify in time, but it does not appear that he ever qualified before a proper officer. The Mayor of the city of San Francisco had no power or authority to administer the oath of office; such power is claimed for him, however, upon the ground that the authority to administer oaths generally was conferred upon him impliedly by a provision of the Charter, taken in connection with a section of the Practice Act. A glance at these provisions will serve to show how untenable is this position. The Charter provides, (art. 4, sec. 2, second subdivision, defining the duties of the Mayor, as "head of the police,") "That the Mayor shall have power to receive and examine into all such complaints as may be preferred against any of them, (the subordinate officers of the police,) for violation and neglect of duty, and to certify the same to the Common

Council." And the Practice Act provides (chap. 8, sec. 442,) that "every Court of this State, every Judge or clerk of any court, every Justice of the Peace, every Notary Public, and every officer authorized to take testimony, or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations."

The word *proceeding* has an understood signification in law, and it will not be seriously insisted upon in a legal argument that the power of the Mayor, as "head of the police," to "receive and examine into" complaints against a policeman for neglect or violation of duty is a *proceeding* in a legal sense, nor that the duty imposed upon him to certify such complaint is an authority to "decide upon evidence" in such proceedings. It is even doubtful whether he could administer an oath in examining complaints against policemen, which he had no right to decide, but could only certify to the Council.

Surely, then, it will not be urged that this duty clothed [128] him with authority to administer oaths *generally; much less can it be inferred that the other and separate power of administering the oath of office was bestowed upon him. Such was clearly not the intention of the Legislature, as is manifest from the "act concerning officers" (art. v., sec. 27, "Of the oath of office,") passed subsequently to the passage of the act creating the Charter.

The next proposition advanced by the appellant is, that having been recognized as Street Commissioner by a joint resolution passed by the Common Council and approved by the Mayor, and having, under the direction of the Mayor and Common Council, performed services as such, he is entitled to recover what those services were worth. It is hardly necessary to argue such a point as this. The work claimed to have been done was in the performance of the duties of Street Commissioner—duties incident to and belonging to the office. The office of Street Commissioner is separate and distinct in its character and functions from the Common Council: it is created and made elective by the Charter, which prescribes how the officer shall be elected, his qualifications, and the manner in which a vacancy in the office shall be filled. The Common Council can neither create a Street Commissioner

or fill a vacancy in the office, nor can it direct that the duties of the office shall be performed by any person other than the lawful incumbent. It may, in the exercise of its legislative power, prescribe the duties of the officer, but it is no more within the scope of its authority to employ a Street Commissioner, or a person to perform the duties attached to the office, than it is to fill a vacancy, or to employ a person to perform the duties of the Mayor or Recorder.

The plaintiff, not being the lawful Street Commissioner, the Mayor and Common Council had no right to contract with him for the services rendered, and he cannot therefore recover upon the *quantum meruit*. The services were rendered by him as Street Commissioner, they belonged to the office, and for which the salary fixed for that office is the only and full compensation fixed by law.

Not being Street Commissioner *de jure*, neither was he *de facto*. William Divier was the lawfully elected and qualified Street Commissioner previous to September 3d, 1851. He continued to *hold the office, and exercise [129] the duties without interference, until the 7th of January, 1852, when the plaintiff demanded the office and the books belonging to it, which Divier refused to surrender, and continued to hold over. He had a right to do so until his successor was duly elected and qualified, and was, and is, entitled to hold against all claimants, to discharge its duties and receive its emoluments, until the office is regularly filled by an election, as provided by the Charter; until then, he could not be ousted, except by suit, or by impeachment and conviction. And it is quite as absurd to say that the Mayor and Common Council could bestow the office upon the plaintiff by a joint resolution, as that they could deprive Divier of his legal rights by the same means: as unreasonable as to claim that the resolution of recognition, which at one time is set up as constituting a contract, shall, at another point in the argument, be considered upon presumption as an official return and certificate of election.

Upon a full examination of the case, we regard the appeal as entirely destitute of merit, and order that the judgment be affirmed.

[130] *THE PEOPLE, Appellants, v. LAFARGE and
BALL, Respondents.

BAIL, WHEN DISCHARGED FROM LIABILITY.—The respondents were bail in a recognizance conditioned for the appearance of M., to answer at court, upon an indictment found against him, on the 19th April, 1852. M. appeared at the proper term, which was the June Term following, and on the 17th June moved to quash the indictment, for causes assigned, which was ordered by the Court. Another indictment on the same charge was found by the grand jury then in session, at the same term, on the 18th June, upon which M., being called, made default. Afterwards suit was brought upon the recognizance, against the bail, and judgment obtained thereon. *Held*, that the bail were entitled to relief against the said judgment.

DISTRICT COURT, POWER TO GRANT RELIEF FROM JUDGMENT.—The District Court is not limited by the present act as to the time within which it may grant relief upon a judgment unjustly or improperly obtained.

IDEM, APPLICATION FOR RELIEF.—No particular form is required by the statute in which application shall be made for such relief. All that is required is, that the facts shall be set forth, and if they show a case coming within the rule, it is sufficient.

IDEM, ON THE GROUND OF FRAUD.—Where the application for such relief charges fraud, among other causes, and the applicant does not rely upon the fraud alone, for his relief, there is no error in the Court granting the relief without first directing an issue to try the fraud.

IDEM, DISCRETION OF COURT.—Whether good cause is shown, is a question properly addressed to the discretion of the Court.

POWERS OF COURTS OF EQUITY.—All courts having chancery jurisdiction have power to set aside a judgment improperly obtained.

APPEAL from the Fifth Judicial District, County of San Joaquin.

This was an application, in the form of a bill in equity, for relief against a judgment, obtained by the appellants against the respondents, under the following circumstances:

On the 9th December, 1852, the respondents petitioned the District Court, praying the Court to vacate, annul, and set aside a judgment obtained by the appellants against them at October Term, 1852, on a recognizance given by respondents to appellants, and that they might be allowed to answer and have a trial on the merits of the questions involved, and in the meantime for an injunction to restrain the respondents from pursuing the said judgment.

¹ Practice, commented on, *Robb v. Robb*, 6 Cal. 22; *Casement v. Ringgold*, 28 Cal. 337. See *Bodleman v. Kewen*, 2 Cal. 248; *Baldwin v. Kramer*, *Id.* 582.

*The case exhibited the following facts: An indictment [131] was found against one Benjamin Marshall in the Court of Sessions of Joaquin County, on the 19th April, 1852, at the April Term, for an assault on one James B. Smith, with intent to commit murder; and a warrant of arrest issued against Marshall, who was arrested thereon, and gave the recognizance above mentioned for his appearance to answer the said charge, which was signed by A. B. Lafarge, and H. M. Ball, the defendants, as bail.

At the June Term of said Court of Sessions, 1852, Marshall appeared, to answer to the charge, and a motion was made by his attorney, that the said indictment be set aside, for grounds set forth in the motion, and which was set aside by the Court. The Court then, on motion of the District Attorney, at the same term, re-submitted the case to the grand jury, then in session, who found a true bill against the said Marshall for the same crime, and which was returned and filed in the said Court of Sessions, on the 18th June aforesaid. On the 19th June, the defendant in the said indictment, Marshall, was duly called, and failing to appear, the recognizance of respondents, on motion of appellants' attorney, was forfeited. And upon the recognizance thus forfeited, the judgment was obtained, against which the defendants prayed to be relieved.

The action on the recognizance was commenced 1st July, 1852, and judgment had thereon by default, at October Term, 1852. The recognizance was dated May 5, 1852, in the sum of \$3000, and recites that the indictment was found on the 19th April, 1852, in the Court of Sessions of San Joaquin County, charging Marshall with the crime, etc., and then proceeds to say, that the condition of the obligation is, that if the said Marshall shall appear and answer the charge, then this obligation to be void, otherwise of force, etc.

The Court, having heard the case, ordered the judgment to be opened, with permission to the petitioners to answer, etc.

And from this order the plaintiffs appealed.

Hastings, Attorney-General, for Appellants.

The Judge did not find the facts, and the cause falls within the rule of *Russel v. Armador*.

[132] *The District Court have no power to set aside a judgment of a previous term against a defendant on motion.

The respondents have filed a regular bill in equity, to set aside a judgment, on the ground of fraud, and have not applied by motion under the statute. The judgment was set aside, without trying the issue of fraud, all of which was irregular, and the Judge had no power to cancel a judgment of a prior term, except upon a finding of the fraud. A court of equity may cancel a judgment for fraud, but it must be established by an issue and trial.

Yale and Perley, for Respondents.

The parties themselves have agreed upon the facts, and a statement thereof is contained in the record. The District Court has power to set aside a judgment of a previous term. (*Bidleman v. Kewen*, 2 Cal. 248, decided by this Court.)

The Court had power to set aside a judgment, at any time within a year, by the last Practice Act, sec. 68, now repealed. By the present act, the Court is not limited to any particular period.

The charge of fraud was not relied upon alone, to sustain the motion, and the mere mentioning this would not vitiate the other grounds alleged.

This was not an original bill. The parties were not reversed. No answer was filed on behalf of the State. A rule was granted to the District Attorney, to show cause why the application should not be granted.

The only condition of the bond was, that the principal "should appear and answer to the Court." This is not a statutory bond, taken according to the 523d sec. of the act of 1852, to regulate proceedings in criminal cases. It has none of the conditions of the statutory bond: it does not state when the party was to appear, or what charge he was to answer.

The obligors could only be compelled to have Marshall before the Court to answer to the charge in the indictment of 19th April. His mere appearance was a full compliance with this condition, and this extinguished the bond.

Neither he nor his sureties knew of the finding of the second

indictment: the bail were not required to produce him to answer *it: the forfeiture of the bond was therefore [133] illegal, and as a panel bond it should have received a strict construction. (3 Yerger, 282; 6 do. 354.)

The complaint on which the judgment was obtained, does not set forth the setting aside of the first indictment, and the finding of another at a subsequent term: there is no averment that the parties are bound to answer the latter by their recognizance. And yet this is the gist of the action, and the judgment was obtained on facts not set forth in the complaint: the defendants are therefore entitled to relief.

The defendants were deceived and misled by the complaint, and if this was done intentionally, it comes within the definition of fraud: "any artifice or deception used to circumvent or deceive another;" and thus fraud may be inferred, in a court of equity, from the facts and circumstances of the case.

Under the order of the Court, the appellants have the right to answer, and to a trial on the merits.

HEYDENFELDT, Justice, delivered the opinion of the Court.

This was a bill in equity, to set aside a judgment which was improperly obtained. The reasons assigned are, that there was no cause of action and no notice to the parties. This remedy is well recognized in all courts having chancery jurisdiction, and the case made out by the complainants is one which fully entitles them to the interposition of the Court.

The Chancellor having heard the evidence, and decided that the parties were entitled to the relief sought, we see nothing, either in the pleadings or statement of the case, which will authorize this Court to disturb the decree.

Affirmed, with costs.

WELLS, Justice, concurred, and delivered the following opinion:

The record and the statement agreed upon between the parties, amply disclose a state of facts that would entitle the defendants to relief from the judgment obtained against them in the court below; and the only questions remaining for us

to consider are, first: Whether the District Court has [134] the power to grant *such relief? and second: Whether, admitting that it had such power, a proper case was made out for the exercise of it?

The power of the Court, under the 68th section of the Practice Act, to relieve the defendants from the judgment, in case the same were taken against them through their inadvertence, surprise, or excusable neglect, is expressly admitted by the District Attorney, in the grounds of appeal set forth by him in the record, but the Attorney-General controverts this doctrine by his associate, and insists that it has been repeatedly intimated, and in one case decided in this Court, by an opinion delivered by Judge MURRAY, that after the term at which a judgment is rendered against a defendant regularly summoned, the District Court has no power to set aside a judgment of a previous term. We have no recollection of such a decision, and as the Attorney-General does not cite the case relied upon by him, no opportunity is afforded us of examining it; but if he cites correctly, the decision has been overruled in *Bidleman v. Kewen*, 2 Cal. 248, wherein Judge MURRAY concurred, and in which the very opposite doctrine was held; indeed, the language of the act is too explicit to admit of such a restrictive conclusion as the Attorney-General would have placed upon it. By the last Practice Act, now repealed, section 68, the Court had power to set aside a judgment upon the same grounds, at any time *within one year* after notice thereof; by the present act, the like power is given, and the Court is not limited in the exercise of it to any particular period. So far, then, from abridging, the Legislature intended by the present act to enlarge the powers of the Court in this respect, and to relieve a party from an unjust or improperly obtained judgment, at any time, upon good cause being shown. The power thus extended to the Court is a safe and salutary one, and, indeed, is absolutely necessary for the due administration of justice. In the interior, or remote districts, the terms are of brief duration, lasting sometimes only a single day, or a week at most, and the districts embrace a wide extent of territory. If the doctrine contended for by the Attorney-General were to obtain,

a defendant would be remediless where an oppressive and unjust judgment had been obtained by default against him, and that, *too, perchance, upon the last day of [135] the term, and even where he had a most meritorious defence.

The next objection to the order of the Court appealed from, is based upon the nature of the proceedings on which it was granted. It is said that the application "is a regular bill in equity, to set aside a judgment on the ground of fraud." We do not so regard it. It does not purport to be a complaint in a new action, nor are the titles of the parties, plaintiff and defendant, reversed or enlarged, but are the same as in the original suit: no summons was issued in the manner required by law for the commencement of civil actions: no answer was required, and none was filed, nor was relief sought upon the ground of fraud alone, but upon all the material allegations set forth in the application: the relief asked for was such as the Court had the power to grant under the 68th section; and upon the application, a rule was issued to the District Attorney—the attorney of record in the case—requiring him to show cause why it should not be granted. In this we cannot discover anything necessarily constituting an original bill in a suit in equity. The statute does not require that the application shall be made in any particular form, or by any special proceeding, either by petition or otherwise: it empowers the Court to grant the relief upon an affidavit showing good cause therefor, and it is not material in what particular form the application was made, nor was it necessary that the precise words, "mistake, surprise, inadvertence, and excusable neglect," should be employed in the application, but only that the facts should be set forth, and if they showed a case coming within the rule, it was a sufficient showing.

It having among other allegations been charged that the judgment had been obtained through fraud, the Attorney-General insists that the order setting aside the judgment was irregular: that the Court had no authority to grant such order without trying the issue, and finding the frauds; and that there must be an issue made and a trial had establishing the frauds. His position might be maintained in an action

brought to set aside a judgment on the ground of fraud, but it can have no standing in the present case, to which it in no manner applies. The same may be said of the rule in [136] *Russel v. Armador*, 2 Cal. 305, cited by him. *The rule there laid down is that a Judge sitting as a jury and trying a case, must find the facts upon which he renders a verdict. In the present case, no issue is found, no trial had, no verdict rendered. It is difficult to conceive what the rule in *Russel v. Armador* can have to do with it.

The charge of fraud may have been, not improperly, added to the grounds upon which the defendants sought for relief. They do not rely upon the allegation of fraud alone, and the mere charge, even if unsustained, did not destroy the merits of the application, and if established, might tend to show that through its means the defendants were induced to fall into mistake, were taken by surprise, or were misled into excusable neglect.

Whether good cause was shown for the opening of the judgment and permitting the defendants to come in and answer, was a question properly addressed to the discretion of the Court below, and we cannot discover that such discretion was in the slightest degree abused; on the contrary, from a full examination of the case, we are satisfied that it was properly exercised. The order of the Court is therefore affirmed, with costs to the respondents.

***PERKINS, Appellant, v. WILSON and GARROT- [137]
SON, Respondents.**

VERDICT, AMENDMENT OF.—The Court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties.

IDEM.—Where there are two defendants, and each answered separately, one denying any connection with the contract declared upon, or liability under it, the other confessing and avoiding it, and claiming damages against the plaintiff, and the jury find against the plaintiff, and in favor of the defendants, and the pleadings and evidence both show that but one defendant was entitled to recover. *Held*, that the Court below did not err in amending the verdict so as to render it conformable to the case.

APPEAL from the Superior Court of San Francisco.

The complaint stated that the plaintiff had leased, on the 10th December, 1850, to one of the defendants, Wilson, a portion of his, plaintiff's farm, for two years, and sets forth the covenants of the lease, one of which was, that Wilson was to work the ground as a garden, sell the produce, and pay one-fourth of the proceeds to the plaintiff when taken to market, and when sold on the ground, one-third of the money received therefor; to keep a book showing all sales, etc., accessible at all times to both parties. That defendant had wholly failed to account, and to pay any portion of the proceeds, etc., to the plaintiff, and calls upon Wilson to account, etc., and lays his damage at \$800.

And further charges, that said Wilson, being in possession of the land under the said lease, he took into partnership with him, in the cultivation thereof, one John W. Garrotson, who well knew of the terms of partnership, and the interest plaintiff had in the product of the land so rented to Wilson, and that the said Wilson and Garrotson worked the land together as partners, and as such jointly received the money for which the proceeds thereof were sold, and that Garrotson is liable to pay the amount received by him, of the proceeds of the produce sold, to the plaintiff, knowing, as he did, that it belonged to the plaintiff, and charges that he received, as aforesaid, \$1000.

Garrotson demurred to the complaint, alleging for [138] cause, *that it contained no cause of action against him; that there is no privity of contract between him and the plaintiff, nor was he in any way a party to the contract sued upon; and answering, denies that he was a partner of Wilson, or that he knew of the agreement between Wilson and plaintiff, or of the interest of plaintiff in the products of the land.

Defendant, Wilson, in his answer, denies breach of contract and all indebtedness to plaintiff, admits the execution of the lease, and denies partnership with Garrotson, and avers that he had acted in good faith and performed all covenants, etc.; and charges that plaintiff had failed wholly to perform the covenants on his part; and specially, that plaintiff had failed to enclose the land in a good and substantial fence, as he had covenanted to do, whereby defendant had lost his crops, and was damaged \$5000, and charges other failures on the part of the plaintiff, and prays judgment against plaintiff for the damages by him sustained, etc.

The case was tried by a jury, who found for the defendants, the sum of \$500. The Court entered judgment that the plaintiff take nothing by his action, but that defendants have and receive of the said plaintiff the said sum of \$500, with interest and costs.

The plaintiff moved for a new trial, which was refused, and defendants moved to amend the verdict and judgment so as to read that the jury find for the defendants, and assess the damages to the defendant, Wilson, to the amount of \$500; which the Court ordered, and that the judgment heretofore entered be amended so as to conform to the said verdict. Plaintiff appealed.

There were several witnesses examined in the case, but the only question considered by the Supreme Court, was, whether the District Court erred in amending the verdict and judgment as above stated.

Brown, Pratt, and Tracy, for Appellants,

Urged that the Court had no right to amend the verdict in the manner shown by the record, and cited 2 Greenleaf's Rep., page 37, and cases there cited.

Clark, Taylor, and Bickle, for Respondents.

*Garrotson, one of the defendants, asks no damages: [139] he merely denies the allegations of the complaint. The verdict was a mistake, giving the damages to the defendants jointly.

Wilson pleaded separately, and claimed damages for breaches of the covenants in the lease, and it was these damages the jury assessed; and whether they should accrue to both defendants or to Wilson alone, was a question of law.

The mistake being one of form only, the Court was perfectly competent to correct it. (*Rew v. Baker*, 1 Cow. 408; *Rockfeller v. Donelly*, 8 Cow. 651; 1 Hill, 209; 3 Dev. 205; U. S. Dig. 1, p. 160.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The question as to the power of the Court to amend the verdict of a jury was fully considered upon the authorities in the case of *Little v. Larrabee*, 2 Greenleaf, 37; and the opinion given meets my entire approbation. The rule there laid down recognizes the power of the Court to amend in "those cases in which the incorrectness or defectiveness of the verdict consists in something merely formal, and which had no connection with the merits of the cause; where the amendment, when made, in no respect impairs or changes the rights of parties, but may only prevent the disturbance of the proceedings by writ of error; or by correcting clerical mistakes, render the record consistent, and the verdict pursuant to the issue."

Let us apply these principles to the present case. Here the two defendants each answered separately—one denying any connection with the contract declared upon, or any liability to the plaintiff, the other confessing and avoiding, and setting up in further defence a right to recoupment of damages against the plaintiff. The jury find against the plaintiff, and five hundred dollars in favor of the defendants.

The pleadings and evidence taken together show beyond question that but one defendant was entitled to the recovery, and the Court below amended the verdict accordingly.

Does this amendment change or impair the rights of the parties? The defendant Garrotson does not complain [140] that he is *deprived of any right, nor could he be allowed to do so: he set up none in his answer, he propounded none in the evidence, and a recovery in his favor would not be allowed to stand.

The issue upon which the finding of damages against the plaintiff was obtained was confined solely to, and pending between, the plaintiff and the defendant Wilson.

It seems, therefore, that the intention of the jury is clearly manifest, and the defect of their verdict is, in my view, merely of that formal character which justified the amendment of the Court.

In all cases where the intent is so plain, and where, by no possibility, injury or injustice can be visited upon either party, it is the duty of this Court to refrain from a disturbance of the judgment.

Judgment affirmed, with costs.

STEVENS & WALKER, Respondents, v. STEWART,
Appellant.

DELIVERY BY ORDER, WHEN EFFECTUAL.—A delivery of an order for goods is only considered as a delivery of the goods themselves, where they are susceptible of an *immediate* delivery.

IDEM, WHAT CONSTITUTES CHANGE OF POSSESSION.—Where no question is raised as to the validity of the contract, or the effect of the Statute of Frauds, and where the question is as to the kind of delivery which effects a change of property, although the goods cannot be immediately delivered, the delay may be implied as one of the stipulations.

SYMBOLIC DELIVERY, WHEN EFFECTUAL.—But, where delivery of the goods is necessary to make the contract, a symbolical delivery can only be effectual where it can be followed by an actual delivery.

DELIVERY BY ORDER AND BILL OF SALE.—The plaintiff contracted with defendant for certain goods on board a vessel, and delivered to him a bill of sale and an order on the captain of the vessel for the delivery of the goods. When defendant presented the order, he was informed that the goods could not be discharged for some time, to which defendant replied that he would then have nothing to do with them, and nine days elapsed before they were discharged, of which defendant had notice, but refused to take them, and pleaded the Statute of Frauds. The Court below charged the jury that the bill of sale and order took the case out of the Statute of Frauds. *Held*, that this was error.

APPEAL from the Superior Court of the City of San Francisco.

This action was brought for the recovery of \$714, the price of *408 gallons of turpentine, which the com- [141] plaint charges that the defendant bought of the plaintiffs, on the 4th August, 1852, which was at the time of the contract on board the ship Hamburg, and that the plaintiffs gave an order to the defendant for the same at the time of the purchase aforesaid, and which, the plaintiffs allege, was within a reasonable time, to wit, the 13th day of August, discharged from the said vessel, of which notice was given to the defendant, with request that he should comply with his said contract, and take the said turpentine, and pay the said price thereof; all of which he refused to do, and prays for judgment, etc.

The defendant's answer admits the purchase of the turpentine as charged, and that he then received of the plaintiffs a bill of sale, and an order from the plaintiffs, on the captain of the ship in which the same was contained, for the delivery thereof, and applied therefor, presenting the said order, and was then ready and willing to pay for the same as agreed upon; but that the same was not delivered, nor ready to be delivered, for a long time, and as defendant believes an unreasonable time, viz., for the space of nine days. That defendant told the plaintiffs at the time of receiving the order that he had already sold the turpentine, and that he would receive it from the wharf that same day, and by the terms of the sale it was to be delivered; and that, by reason of the non-delivery, the defendant was unable to complete said sale of the same, which he had negotiated, and has sustained, by reason thereof, damage to the amount of \$95, and therefore prays judgment, etc.

The cause was tried by a jury, who found for the plaintiffs \$714. Defendant moved for a new trial, which was denied, and judgment rendered in accordance with the verdict.

The bill of sale and order, as set forth in the statement, are as follows:

SAN FRANCISCO, Aug. 4, 1852.

Mr. JAMES STEWART,

Bought of STEVENS, WALKER & Co.,

7 cases cont. 4 cans each, spts. turpentine,

Each can 6 gallons, 408 gals. @ \$175 \$714

[142]

*SAN FRANCISCO, Aug. 4, 1852.

Capt. Ship Hamburg,

Broadway Wharf,

Please deliver this order of James Stewart, 17 cases spirits
turpentine, marked S, and oblige,

STEVENS, WALKER & Co.

And the defendant proved, that when he presented the said order to the discharging clerk of the said ship, he informed him that the turpentine could not be discharged for several days, to which defendant replied that he "then would have nothing to do with it." It was also in evidence that the turpentine was discharged on the 13th, of which defendant had notice, who refused to receive it.

The defendant, when the evidence was closed, moved a non-suit, on the ground that the goods not having been delivered, the case was within the Statute of Frauds, which the Court refused, for the reason that the giving of the order, accompanied by the bill of sale, was a constructive delivery, sufficient to take the case out of the statute, but sent the cause to the jury upon the question, whether the actual delivery or readiness to deliver, was according to the terms of the contract. The Court charged the jury, that the case was not within the Statute of Frauds, and it was for them to say whether it was a part of the contract that the goods were to be delivered immediately; that if they so found, they might find for the defendant such damage as he had proved, but if they should find that the goods were deliverable only as they could be reached in the process of discharging the vessel, they might find for the plaintiffs.

After the verdict and judgment, as above stated, defendant moved for a new trial, which was denied, and defendant appealed.

Clarke, Taylor, and Bickle, for Appellant.

Where goods are in the possession of a shipowner or wharfinger, etc., or other agent of the vendor, a delivery order, accepted by such agent, constitutes such agent the agent of the vendor, and takes the case out of the Statute of Frauds. (5 Phil. Evid. 93; 2 Esp. N. P. 598; 3 Barn. & C. 423; Chitty on Cont. 681, 2, 3, 4.)

*The Court erred in leaving to the jury the question [143] of reasonable time, and in allowing a written contract to be varied by parol.

There is no brief on file for respondents.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The defendant relies on the Statute of Frauds. To avoid this defence the plaintiffs show, that after the parol agreement for the sale of the goods, they delivered to defendant an order upon the master of the vessel for the goods. It appears that upon presenting the order, the defendant was answered that the goods were not ready to be discharged, and would not be for several days, whereupon he abandoned the contract.

It is now insisted by the plaintiffs that the delivery of an order for the goods, was such a delivery as takes the case out of the Statute of Frauds.

Several cases have been cited to show that a delivery of an order is a delivery of the goods. But it seems very certain that it is only so considered where the goods are susceptible of immediate delivery.

There are other cases, where no question is raised as to the validity of the contract, or the effect of the Statute of Frauds, where the point to be decided was, as to the kind of delivery which effected a change of property, or completed the execution of the contract.

In many such cases, although the goods cannot be immediately delivered, the delay is implied as one of the stipulations. But where delivery is necessary to make the contract, a symbolic delivery can only be effectual where it can be immediately followed by an actual delivery.

It is urged that the proof in this case shows that the defendant purchased with the knowledge that the goods were on shipboard, and therefore made the bargain with the implied understanding that they could only be delivered within such reasonable time as it required the vessel to discharge. This would be a good argument, if the contract had been in writing, to prevent the defendant from avoiding it for [144] want of delivery. But the *argument itself proves a non-delivery, and there cannot be at the same time a delivery which takes the case out of the statute and a good legal excuse for non-delivery.

Judgment reversed, with costs.

TOOTHAKER, Respondent, v. CORNWALL, Appellant.

¹ NEGOTIABLE INSTRUMENT, NOTICE OF NON-PAYMENT PREMATURE.—A promissory note was made before the Act of 1851 (which makes the 4th of July a non-judicial day,) which fell due on the 1st of July, and was payable on the 4th. *Held*, that notice of non-payment on the 3d was premature, and ineffectual to charge the endorser.

APPEAL from the Sixth Judicial District.

This action was brought by the plaintiff, who was the endorsee of a promissory note at Sacramento City, November 8th, 1850, made by Barton Lee, who thereby "promised to pay, on the 1st day of July next, to the order of P. B. Cornwall, defendant, \$500, with interest at the rate of one per cent. per month," and which was endorsed to the plaintiff by the said P. B. Cornwall.

The defence was want of notice of non-payment by the drawer. The plaintiff proved by several witnesses that search and inquiry had been made for the drawer on the 3d July, for the purpose of presenting the note for payment, but without effect; that he had no place of business in the city, nor

¹ Same case, 4 Cal. 28, disapproved in *McFarland v. Pico*, 8 Cal. 690.

could the witnesses learn where he had. The witnesses were in the employ of Freeman & Co., who had the note for collection; that they had called at defendant's office, but could not learn where Lee was, or where he resided.

Mr. Hyer, a witness and attorney for plaintiff, stated, that on the 4th of July, 1851, he made inquiry of several persons for Lee; ascertained from Cornwall and others, that he was not in the city, but was at the mines, and had no place of business in the city. [Defendant's counsel objected, because 4th of July was a holiday, and exempt from business; and the Court ruled that the plaintiff might show anything bringing the fact of non-payment on the 3d to defendant's notice.] Witness told *Cornwall that Lee could not [145] be found, who told him he did not know where he was, but believed him to be at the mines. The note had been placed in witness's hand as attorney, who further said, "I notified Cornwall, verbally, of its non-payment, and asked him if he wished a written notice of the fact. Cornwall told me that he intended to take any advantage he could in regard to the non-payment of the note."

H. R. Ferre swore that he ascertained, on the 3d of July, from defendant and others, that Lee was not in the city of Sacramento, and that consequently he could not present the note for payment; and witness told the clerk in the office of defendant, (he not being present,) that he had not been able to find Lee; that he was aware, in other States, a note falling due upon the 4th of July, required to be presented upon the 3d of the month, but whether the rule prevails in this State or not, he did not know, but thought it best to be on the safe side, and to give Cornwall notice of his inability to find Lee upon that day, and requested the clerk to inform Mr. Cornwall that he (witness) had been at his office with the note: this was about 3 o'clock P. M. Witness was in the employ of Freeman & Co., who held the note for collection.

April 26th, 1852, the cause was tried by a jury, who rendered a verdict for plaintiff for the amount of the note and interest, and judgment was entered accordingly.

The defendant moved for a new trial, which was refused, and he then took this appeal.

Winans and Hyer, for Appellant.

The note was payable on the 1st of July, and was made before the statute concerning holidays.

When Mr. Hyer inquired of defendant for Lee, and was told he was at the mines, etc., defendant told him that "he would avail himself of all legal rights in his defence to the note."

The note was payable on the 4th of July, and the notice on the 3d was premature.

The notice given by Mr. Hyer was not sufficient, because it was given on a holiday; because it was not intended to be a notice, and to place the endorser on his guard, but in [146] terms *left something else to be done. It was not sufficient and explicit, inasmuch as it did not describe the note, nor allege the presentment to, or search for, the drawer.

Saunders and Haggins, for Respondent.

Due diligence is all that is required to make presentation of a note to a maker, and what constitutes due diligence, is a question depending upon the special circumstances of the case. (Stat. on Promissory Notes, secs. 205, 236, 238, 240, 264.)

As to time of notice, *Ib.* secs. 320, 321. The notice may be oral and at the place of business of the party, to receive it. *Ib.* 341.

Defendant's own declaration, that the drawer was away at the mines, made the day the note became due, and the day after, was a virtual waiver of presentment to the maker.

The jury found as a fact that presentment could not be made at maturity, because the maker could not be found, and that defendant was duly notified of that fact, and of the dishonor of the note.

The note was considered, under the statute, as due on the 3d of July, and so treated. Effort was made to present it on that day to the maker, and as he could not be found, defendant was notified on that day, and also on the 4th.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The act of 1851, which makes the fourth day of July a non-judicial day, by its terms confines its operation expressly to bills, checks, and notes, made after the passage of the act.

In this case, the note in controversy was made before the passage of the act, and is not within its provision, consequently it fell due on the 1st, and was payable on the 4th day of July. It is not pretended by the plaintiff that notice of its non-payment was given on the 4th or afterwards, and the notice on the 3d was premature and ineffectual.

The judgment is reversed, and the case remanded.

***M. KELLER v. R. YBARRU.**

[147]

CONTRACT TO DELIVER GOODS, WHEN COMPLETE.—A contract by defendant, "to deliver to plaintiff as many grapes as he should wish, at a given price," is a mere offer, which the plaintiff had the right to accept or reject, and defendant to retract at any time before acceptance; but when the plaintiff named the quantity which he would take, the contract became complete, and both parties were bound by it.

APPEAL from the First Judicial District of Los Angeles County.

This action was brought upon an agreement between the plaintiff and defendant, which set forth, that about the 15th day of June, 1852, the plaintiff and defendant entered into a contract, whereby the defendant agreed with the plaintiff to sell, and pick from the vines, and deliver to plaintiff, at the vineyard of defendant, so many of the grapes then growing in said vineyard, as plaintiff should wish to take the present year, the plaintiff to have the first grapes that were ripe, for which plaintiff agreed to pay defendant ten cents per pound, cash, on delivery; and plaintiff avers, that on the 19th Aug., 1852, he notified the defendant that he wished to take of said grapes 1900 pounds, and tendered the defendant \$190 in payment therefor, and requested the defendant to pick and deliver the said quantity to the plaintiff; but that defendant refused to deliver the same or any part thereof.

The defendant denied all the allegations of the bill, and the cause was tried by a jury, who were instructed by the Court that the contract set up in the plaintiff's bill was void, for want of a binding consideration on the part of the plaintiff, which plaintiff excepted to; and judgment being rendered for the defendant, the plaintiff took this appeal.

Sutherland, for Respondent,

Argued that there was no mutuality in the contract, as set out, and cited *Chit. on Cont.* 27, 28.

The contract is void by the Stat. of Frands. (Statute of 1850, 267, sec. 13.)

[148] *No brief for appellant on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

When the agreement, which is the subject of this action, was first entered into, it amounted to a mere offer on the part of the defendant, which the plaintiff had the right to accept or reject, and the defendant to retract, at any time before acceptance. When, however, the plaintiff named the amount of grapes which he would take under the offer of the defendant, the contract was complete, and both parties were bound by it.

The Court below, therefore erred in deciding for the defendant, and the judgment is reversed, with costs.

RABE, Appellant, v. WELLS & CO., Respondents.

PARTNERSHIP, NOTICE OF DISSOLUTION.—The question of notice of the dissolution of a partnership, is a fact for the jury, under the charge of the Court.

ERROR, MUST AFFIRMATIVELY APPEAR.—Error which is relied upon, must be shown clearly and affirmatively.

APPEAL from the Fourth Judicial District.

¹ Cited, *Morgan v. Hugg*, 5 Cal. 410. See *Clayton v. Wells*, 2 Cal. 381; *Kilburn v. Ritchie*, Id. 145.

This action was brought, October 7th, 1851, against Thomas C. Wells, H. Willes, and Lucien Skinner, of Boston, as partners and bankers in San Francisco, doing business under the firm of Wells & Co., of whom the plaintiff complained that the defendants were indebted to him for money deposited in trust, payable on demand, to wit, \$2278, payment of which defendants had refused, etc., after demand made, etc.; and prays for judgment, etc., and that publication issue against the non-resident parties.

The sheriff returned "served personally on defendant, Wells, in San Francisco."

An attachment also issued, and the right, title, and interest in certain property of defendants, as described in the sheriff's return, was attached.

The Court ordered publication to be made in the "Alta *California" and "Daily Herald," for three [149] months, of the said complaint, the absence from the State of L. Skinner and H. Willes being shown.

The answer of T. G. Wells denies all the allegations of the bill.

And the answer of Willes and Skinner also denies the allegations, and specially denies that they were doing business as bankers in the city of San Francisco, under the name, etc. of Wells & Co., or in connection with said Wells at the time alleged in said complaint, and pray to be dismissed, etc.

The cause was tried by a jury.

Plaintiff proved that there was a firm in San Francisco composed of the defendants and one Hird, (not sued,) who began business January 1st, 1850, under the title of Wells & Co., who owed plaintiff \$1091 49, who kept an account with Wells & Co. from February, 1851.

The same witness proved, on cross-examination, that T. G. Wells purchased out the interest of the other partners about the 21st March, 1851, that public notice was given in the "Alta California" of the dissolution; that Willes & Co. had not, since that, participated in the profits and losses. Plaintiff began to deposit again with Wells & Co., 10th September, 1851; he had before been a special depositor. After the May fire, Wells made an assignment.

Defendants also proved notice of the dissolution of the partnership in the "Alta California" and the "Pacific News," and the delivery of the papers at the house of the plaintiff.

To refute the evidence which had been produced by defendants, Willes and Skinner, to show that they had dissolved the partnership with Wells, plaintiff introduced a witness, "to prove that said dissolution was not *bona fide*," and propounded to him the following questions: What amount of money did these partners (other than Wells) draw out of the concern in cash and its equivalent? What were the liabilities of the said house? Was there a failure in the business of the house soon after the dissolution? How long after? How stood the affairs of the house after the first failure? What sort of business did the house of Wells & Co. do after the failure? Did it make or lose money? How much? Did

Wells take money out just before the last failure?
[150] How *much? When Wells bought out the other de-

fendants, what was the character of the assets and their value, and the amount ascertained? What were the cash assets and contributions of each partner in the beginning? Did Mr. Skinner or Mr. Willes bring \$50,000 into the concern, as the articles had stipulated?

The counsel of Skinner and Willes objected to each of these questions as respectively propounded. The Court sustained the objections, and plaintiff's counsel excepted.

The Court below charged the jury, "That if there was a dissolution of the firm of Wells & Co., and that Willes & Co. withdrew, and notice of such dissolution was published, then that the plaintiff, having had dealings with the firm prior to the dissolution, was entitled to notice.

"That the fact of the advertising, and that the plaintiff took the paper, was proper evidence to go to them, the jury, and they were to ascertain whether the plaintiff had notice. If they were satisfied that he had notice, then their verdict must be for the defendants, Willes and Skinner, and against T. G. Wells."

The jury found for plaintiff against Wells only, \$2344 44, and in favor of the other defendants; and judgment was entered accordingly, from which plaintiff took this appeal.

Cooke, for Appellant.

The Court erred in refusing evidence that the dissolution was fraudulent; that they offered to prove in substance that Willes allowed the other partners to draw out very nearly all the funds, when they owed largely to depositors.

Evidence of newspaper notice of dissolution does not bring the fact home to plaintiff.

Willes, for Respondents.

No such partnership existed in reality as that charged in the complaint. This partnership was dissolved before the indebtedness of Wells & Co. to plaintiff.

The issue did not admit of plaintiff proving fraud, and the evidence was properly excluded.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

*The question of notice as to the dissolution of the [151] partnership was properly left to the finding of the jury under the charge of the Court.

In the issue presented by the pleadings, it would have been proper to introduce evidence to show that the dissolution was not *bona fide*, but it does not appear how the evidence which was rejected would have tended to that result.

Error which is relied on must be shown clearly and affirmatively.

Judgment affirmed.

CALEB HYATT, Respondent, v. FELIX ARGENTI,
Appellant.

BAILEMENT, AGREEMENT FOR SALE OF SECURITIES.—A party depositing securities for securing the payment of a debt, or advancements made thereon, may agree that they shall be sold, at the option or pleasure of the creditor.

AUTHORITY OF BAILEE TO SELL.—And where the plaintiff drew several drafts upon the defendant, who held the deposit, directing him to pay them "from the proceeds of the securities in his hands," this was held to give an authority to the plaintiff to sell the securities deposited to meet the drafts.

IDEM.—An order to pay, “when in funds, from the proceeds,” makes the deduction conclusive, that other sales had yet to be made by the defendant.

IDEM, VALIDITY OF SALE.—A sale made under such authority, is good without notice to the plaintiff of the time and place of sale, or previous demand of payment.

¹ **IDEM, PERSONAL PROPERTY MAY BE PLEDGED, ETC.**—Personal property may be pledged, mortgaged, hypothecated, or placed in trust, upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case.

² **IDEM, CONTRACT OF BAILMENT.**—When such contract is absolute upon its face, the party asserting a condition or limitation, must show it.

APPEAL from the Fourth Judicial District.

The complaint set forth, that plaintiff, being the owner of city scrip of the City of San Francisco, to the nominal amount of \$45,215 60, bearing interest at the rate of 3 per cent. per month, and requisitions of the Comptroller upon the City Treasurer for moneys due to plaintiff for planking [152] streets, to the *nominal amount of \$94,746 62, and bonds of the city to the nominal amount of \$90,000, bearing 10 per cent. interest per annum, deposited the same with the said defendant, to hold as his agent, and charges that defendant had fraudulently converted the same to his own use, in the course of his employment as agent as aforesaid, to the damage of plaintiff \$60,000, and prays judgment, etc., which complaint was sworn to, and filed by defendant 21st January, 1852.

Defendant, in his answer, denies specifically every allegation of the complaint, and avers that plaintiff is not the party in interest; and then admits that certain securities, being a portion of those mentioned in the complaint, were hitherto hypothecated with him by the plaintiff, and others connected with him, and pledged as collateral security for the prompt payment by him of certain advances made by defendant to plaintiff, and for debts and accounts then due from plaintiff to defendant; and for such other advances as should be afterwards made to plaintiff by defendant, and to cover all subsequent advances made upon his account; and that, by an agree-

¹ Cited, *Dewey v. Bowman*, 8 Cal. 150. See *Payne v. Bensley*, Id. 267.

² *Davis v. Mc R.R. Co.*, 46 Miss. 569.

ment made between them, at the time of the hypothecation aforesaid, the defendant had the right to *sell without notice*, any or all of said pledges or securities, in the event of any of the said advances being unpaid, and to apply the net proceeds of such sales to the payment of such unpaid debts and advances, etc.; and avers that there were and are still existing debts and advances due from plaintiff to defendant. And that, under the power conferred on him by plaintiff, he did sell the said securities so hypothecated, from time to time, and applied the proceeds to the payment or part payment of said outstanding debts, etc.; and after the entire application of said net proceeds as aforesaid, there is still due and unpaid from plaintiff to defendant the sum of \$12,750, with interest at the rate of 5 per cent. per month; and defendant makes the said debts, advances, and the balance due, a counter claim in this action, and prays judgment in his favor, etc.

This answer was sworn to by M. Berri, the attorney in fact for defendant.

This cause occupied much of the time of the Court below, and the testimony taken in the course of the trial is very voluminous. *The facts, so far as they are [153] deemed material, in reference to the view taken of the case by this Court, appear to be as follows:

The firm of Hyatt, Cox & Sheldon had a contract with the City of San Francisco for planking certain streets of the city, and applied to the defendant Argenti for aid, who agreed to assist them, and with whom they opened an account, giving first to the defendant their endorsed note for \$5000, which the defendant passed to their credit. This note bore interest at the rate of 7 per cent. per month. Without taking up the note when it fell due, the firm arranged with the defendant for further credits, by transferring to him their claims under their contract with the city, (specified in the complaint,) which transfer was absolute upon its face. These claims were in the form of what was called "requisitions," which were estimates of work done, certified by the Street Commissioner, and otherwise authenticated. By these transfers, defendant claimed to be invested with the whole legal title to, and con-

trol over, the said securities, subject to the equitable interest of the said firm in the premises. Upon the securities thus transferred, the defendant proceeded to make advances to the firm, and also agreed to reduce the interest with which the account commenced, from 7 to 5 per cent. The "requisitions" were all transferred in October and November, 1850, and the money nearly all advanced in October and November. Up to that time, the whole amount of cash advanced was \$43,590; the amount of requisitions transferred to defendant was \$——, which were partly collected in cash by him, part in scrip, and part were funded. On the 18th February, the defendant rendered an account current to the firm, in which they are credited with the cash received by him, except about \$4000, the scrip and requisitions to be funded, remaining in defendant's hands. This account showed a balance due defendant of \$19,993 63. On the 22d February, defendant paid a judgment against the firm of some \$3400; and on the 31st July, rendered another account current, showing a balance then due him of \$24,011 45. It does not appear that any exception was taken by the firm or by defendant to either of these accounts.

It appears that the accounts between the parties stood thus till September 6th, 1851, when defendant sold part of [154] the scrip, *and continued to make sales down to January 5th, 1852, when he closed up the account. As the sales were effected the proceeds were carried to the credit of the firm on defendant's books, which, it is in evidence, Hyatt, the plaintiff, had access to, and frequently examined. On the 5th January, another account was rendered by defendant, crediting the entire sales, and leaving a balance due to him of \$2677 28. It does not appear that any direct notice was given by plaintiff to defendant, or the firm, of the sales of the securities made by him, which appear to have been private, or made through brokers selected by the defendant. It was in evidence, however, that in October, (24th,) 1850, (the arrangement between the parties having been made in September preceding,) that the firm drew upon defendant, first for \$8000, and then for several other sums, of \$2000, \$6000, \$3086 61, and other sums, directing him to pay the same in

each of the drafts, "from the proceeds of the securities now in your hands, and such other securities as will hereafter be placed in your hands by us." And on the 27th December, the firm drew another draft upon defendant for near \$8000, made payable "when in funds, from the proceeds of the securities placed in your hands by us, after deducting the amount due you for cash advanced, and the interest on the same."

It was in evidence, that on the 13th March, 1851, Cox & Sheldon, two members of the firm, had assigned all their interest therein to defendant Hyatt.

The case was submitted to the Court without a jury, who found the amount of scrip hypothecated to be \$80,636 75, which was payable two-thirds in cash and one-third in city scrip; the amount of scrip received by defendant upon the requisitions; and that the scrip had been converted by the defendant to his own use, (after the assignment of Cox & Sheldon to plaintiff, and prior to November 1st, 1851,) in part by private sale, without notice to plaintiff, and in part by funding them, mixed with other scrip, with the commissioners of the funded debt of the city, without the knowledge or consent of the plaintiff; and also that the requisitions had been converted in like manner; and also that the scrip had been sold in the market (the highest rate,) November 2d, 1850, at 10 per cent. premium, and *requisitions, [155] January 8th, 1851, at 5 per cent. discount; and that, taking these sales as data, the damage sustained by plaintiff by the conversion amounted to \$53,840.

Several other facts were found by the Court, which do not appear to have any bearing upon the case as considered by the Supreme Court.

The facts and data thus found, together with an open account of plaintiff against defendant, were referred to the clerk of the court, to state an account between the parties, who reported a balance due to the plaintiff from the defendant of \$36,977 98, for which judgment was entered by order of the Court.

A motion was made by defendant for a new trial, which was overruled, and this appeal was taken.

McDougal, for Appellant.

The defendant was in no respect the plaintiff's agent, nor was he a pledgee—(2 Bouvier, Pledge, 3, 4; Story's Bailment, 286; Jones on Bailment, 117)—nor mortgagee. (Bouvier, Pledge, 6.) The distinction between a pledgee and a mortgagee is, that it is created by a grant by which the whole legal title passes conditionally. The securities were transferred in writing, without any condition. Defendant held them in trust to pay his debt, and account for the surplus. (2 Bouv. 605; Levin Trustees, 15; Saund. 6.)

If defendant was a trustee, he is amenable only to the equitable jurisdiction of chancery; and proof of this will not sustain a proceeding in tort, based upon legal title to the thing converted, and charging agency, or a naked bailment for safe keeping.

But the defendant was a trustee, with power to sell for the purpose of reimbursing himself. He had the right to do with them what was necessary and proper for his own protection, doing it in good faith, and using prudence. The assignments are absolute on their face, and carry with them the full *jus disponendi*. There is no testimony showing that this power was qualified, and this can only be gathered by defendant's answer, and this asserts the power to sell also, and these must be taken together.

That the trust was to be executed by a sale of the [156] securities, *is shown by defendant's conduct throughout. The firm drew on defendant a great number of sight drafts, when they had no money in his hands, "*payable out of the proceeds of securities held by him.*" If defendant had been a mere agent, and held securities for the purpose of providing funds, and such a draft had been presented and refused, he having undertaken to provide funds out of the proceeds of sale, which fact the drafts assume, he would have been liable in damages.

Hyatt examined the books of defendant frequently, which contained the entries of the sales, and never objected.

But, if there were no original power to sell, the conduct of plaintiff amounts to an acquiescence, and he will be held to

have approved the sales: his examination of the books, knowledge of the facts, and receipt of accounts current without disapproval, is a virtual approval. (Levin, 639, 640-1; 17 Veng. 326.)

The rendition of the accounts current was a liquidation and settlement of the accounts, no objection being made. (10 Barb. 215; 2 Ib. 586; 2 Greenleaf Ev. 127, 8; 4 Bing. 459; 3 Cor. & Payne, 236; 2 Brod. & Bin. 99; 13 Earl, 249.)

The argument of the counsel embraced other points made in the case not considered by this Court.

Brooks, for Respondent.

The requisitions and their proceeds, were pledged with defendant by plaintiff, and could not be sold without demand of payment, and notice of the time and place of sale. (4 Den. 227.)

Such sale is a conversion, and the rule of damage is the highest value between the time of conversion and the time of trial. (3 Con. 82; 7 Ib. 681; 1 Ib. 240; 3 Comst. 78; 1 Sanford, 361; 20 Wend. 94; 22 Ib. 348, 366-7; Paine, 626; Sto. Bail, sec. 122, 191, 269, 290, 308, 318, 321, 322, 396.)

A note may be pledged, and the transfer of the legal title is necessary to carry the possession, but this does not alter the character of the transaction, and cited *Wheeler v. Wheeler*, 9 Cow. 24; see, also, 1 Sandf. 248. Abuse of lawful possession is breach of trust, and amounts to a conversion. (3 Johns. 432; Salk. 130, 154; 2 Bos. & P. 453.)

An absolute transfer of a promissory note may be shown to be *collateral. (2 Hill, 140; Sto. Prom. [157] Notes, sec. 284; 20 Johns. 634, 640, *et seq.*; 1 Bos. & P., *Collins v. Martin*; Chitty on Bills, 74, n. 2, and p. 198, n. 2; 19 Johns. 66; 10 N. H. 264.)

If the Court are satisfied that the transaction is a pledge, there is then no error in the ruling of the Court below.

The opinion of the Court was delivered by HEYDENFELDT, Justice.

This is an action of trover for the wrongful conversion of certain securities, called scrip, requisitions, and bonds.

The defendant was to make advances of money from time to time to the firm of Hyatt, Cox & Sheldon, (who, in this action, are represented by the plaintiff Hyatt,) and Hyatt, Cox & Sheldon were to place the securities, as fast as received, in the possession of defendant, accompanied by an absolute assignment in writing.

Various amounts were drawn by Hyatt, Cox & Sheldon from defendant, and the securities, placed in the hands of the latter, were sold at different times for their market value, and placed to the credit of the firm.

These securities subsequently appreciated in value in a great degree. The plaintiff now insists that the defendant had no right to sell them without notice to him, and is, therefore, guilty of a conversion. Upon the facts set out in the bill of exceptions, the Court below decided that by the rules of law the defendant had no legal authority to sell or dispose of the securities, and was therefore guilty of converting them to his own use.

Much argument and authority has been displayed upon the question, whether the holder of a mortgage or pledge of securities or personal property can sell when the debt becomes due, without notice to the mortgagor. From the evidence contained in the bill of exceptions, we think the consideration of that question is unnecessary. It will not be doubted that a party depositing such securities may agree that they shall be sold at the option or pleasure of the creditor. And we can come to no other conclusion than that such was [158] the contract in the present case. It *appears, according to the bill of exceptions, that the engagement between the parties took place in September, 1850.

On the 24th October following, the firm of Hyatt, Cox & Sheldon drew a draft on defendant, directing him to pay, on the 30th October, to the order of H. Meigs, eight thousand dollars, "from the proceeds of the securities now in your hands, and such other securities as will hereafter be placed in your hands by us."

On the same day, another draft was drawn by them for two thousand dollars, payable on the 26th, using the same language.

On the same day, another, payable at sight, for two thousand dollars, and in the same terms.

On the same day, a third draft, payable the 20th November following, for six thousand dollars, at sight, and in the same terms.

On the 8th November, another draft, at sight, for \$3086 61, in the same terms.

And on 29th December, a draft is drawn by them for \$7952 03, payable "when in funds from the proceeds of the securities placed in your hands by us, after deducting the amount due you for cash advanced and the interest on the same, and also the amount due McCoudray." An express stipulation in writing could not exhibit more clearly the authority of the defendant to sell the securities than does the language of these drafts. The money drawn for was to be paid from the proceeds: proceeds can only be obtained by sale, and the language of the last-mentioned draft, "when in funds from the proceeds," makes the deduction conclusive that other sales had yet to be made by the defendant.

It appears, moreover, from the evidence of Meigs, one of the plaintiff's witnesses, that he informed the plaintiff of the sale of the bonds, and the price for which they sold, at which he says, "Hyatt objected to the price at which the bonds were sold, and said it was eating him up." This is the language of a man complaining of hard fortune, but certainly not of breach of contract or of bad faith, and it is pregnant with the admission of the right of the defendant to sell.

This view of the case renders it unnecessary to consider the other assignments of error. It is clear to our minds that the defendant is not guilty of conversion, and the plaintiff has mistaken his action. If the defendant is indebted to him, his proper *remedy is within the equitable [159] jurisdiction of the Court by bill for an account.

The judgment is reversed, and a nonsuit against the plaintiff is ordered with costs.

WELLS, Justice, delivered the following opinion, concurring with the opinion of Mr. Justice HEYDENFELDT.

The city scrip and requisitions, alleged to have been fraud-

ulently converted by the defendant to his own use, were transferred to him by assignments in writing, absolute on their face, for value received, and carrying with them the *jus disponendi*. But it is insisted, on the part of the plaintiff, that notwithstanding the absolute transfer of the property and legal title in these securities, still they were, in truth and in fact, only held by the defendant in pledge, as collateral security; and being so held, that the sale of them by defendant without demand of payment, and notice of the time and place of sale, was a conversion, and a fraud upon the plaintiff.

The rule of law as stated is doubtless correct as applied to a proper case, and the point here is, whether such a case is presented as renders the rule applicable?

It will not be denied that collateral security may be held in as many various ways and subject to as many different conditions, as there is variety in the objects and character of contracts; thus, personal property, merchandise, or stock, may be held as collateral security, in the nature of a mortgage, in which the parties could agree that in case of non-payment, the right of property should become absolute, and that, without notice or foreclosure; or, it may be held as a pledge, the right of restoration upon the payment of the debt, being reserved to the debtor; and it is competent for the parties to contract, that the goods or stock thus pledged as collateral may be sold with or without notice, and upon non-payment without demand of payment. So, also, goods or stock, or other securities, may be held by the creditor under an absolute transfer, in trust for the debtor, with the power in the creditor to sell and reimburse himself for advances made, or to provide himself from time to time with funds to meet the additional demands of his debtor, and to pay his drafts, [160] or in other *words, it is competent for parties to form these contracts to suit themselves, and courts of law will be governed by the plain import of the language of the contract in each particular case.

The transfers of the property in the present case were, as we have seen, absolute upon their face, and carried with them the undoubted and unrestricted right in the defendant to sell, and convey, and convert at his pleasure; and if that right was

qualified or limited in any manner, or controlled by an agreement between the parties to the contract, that fact must be established. It is conceded by the defendant in his answer, and upon the argument, that he was intrusted with these securities for the purpose of indemnifying himself for advances made, and that he had the right to do with them whatever might be necessary or proper for his own protection; and he especially sets up, that it was distinctly understood that if the moneys advanced should remain unpaid, after becoming due, he should have the right to sell without demand and without notice; beyond this admission of defendant, there is no proof whatever to show that the transfer of the property to him was in any degree qualified or conditional, and if taken as evidence against him, must be taken in connection with the allegation of his right to sell. It is said by the Court below, that this is a pledge in its strictest sense, and upon this assumption, it rules that therefore the creditor had no legal authority to sell; but this assumption cannot be maintained. I do not question that if this were merely a pledge on deposit of the securities, to secure the payment of a certain sum of money upon a future day, without the power of sale, that the right to redeem and to a restoration of the property would be reserved to the creditor, and that sale could not be made without previous demand of payment and notice; but this cannot be assumed in this case in the face of the absolute transfer and power to sell; and upon the state of facts shown, the legal presumption cannot be raised. On the contrary, the legal presumption is, that the transfer being absolute, the right to sell and dispose of the property was perfect; and even though it could be said that this was strictly a pledge, yet the pledge was accompanied by the unqualified power to sell without demand and without notice. And who shall say that such was not the intention of the parties? It was perfectly *competent for the plaintiff to agree that the defendant [161] should have the right to sell and dispose of the scrip, to convert the requisitions into bonds, and to dispose of them at such times and at such places, and in such manner as he should deem best and most prudent for the interests of all parties; and, indeed, it was consistent with the defendant's interest

that he should have such power for his own protection, and to reimburse himself for advances made, and equally so with the plaintiff's object to reduce the amount of interest, which he complained was "eating him up;" and it was consistent also with the terms of the contract, and with the employment and occupation of the defendant in connection therewith. Moreover, no proof of any character whatever is adduced to establish the fact that this full and complete power of sale was not intended to be given. The position of the Court below, and the respondent here, is based solely upon the rule of law that in case of a naked pledge as collateral security, the authority to sell, when not expressly given, cannot be exercised without demand of payment and notice. As I have already stated, this is not such a case, and the rule is therefore inapplicable. An examination of the cases cited by the respondent, and relied upon by him as authority, will show wherein the rule fails to apply. In the case of *Wilson v. Little*, 2 Comstock, p. 443, the plaintiff, through his broker, negotiated a loan of \$2000 with Little & Co., and gave, as collateral security, fifty shares of Erie railroad stock. The contract was in writing, in the shape of a promissory note, which set forth that the plaintiff had deposited the stock described with the defendant, as collateral security, *with authority* to sell the same on the *non-performance* of the promise, without notice; and at the same time he made a transfer of the stock on the books of the company to the defendant. In deciding the case, the Court, per RUGGLES, Justice, says: "In the present case, the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character are qualified and explained by the contemporaneous paper, which declares it to be a deposit of the stock as collateral security for the payment of \$2000." And it was there held, [162] that the creditor *could not sell the same until he had first demanded payment of the debtor; but it will be observed also, that there the creditor sold before demand, and that the note was payable on demand, and the authority to sell was given only in case of non-performance. So also

in *Allen v. Dykers*, 3 Hill, 594. In that case there was a loan of money, and a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same *on non-performance* of the promise, 250 shares of a certain stock therein mentioned. The money in that case was payable in sixty days; the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The Court held that the sale was a conversion, for the reason that the defendants had not *demand*ed payment of the plaintiff before selling; but the ruling of the Court was placed upon the ground that the power to sell was expressly restricted by the terms of the contract, and was granted only in case of *non-performance*, and therefore that demand of payment was necessary. It will be borne in mind, also, that in that case the stock was converted before the maturity of the note. The rule in the case of *Stearns v. Marsh*, 4 Denio, 227, also cited and relied upon by the respondent, is based upon the same principle, and depends upon the written contract of the parties. It was where a number of cases of boots and shoes were pledged as security for a debt coming due, and payable at a future day: it was held that the creditor could not sell the same until he first called upon the debtor to redeem the pledge; and that he must also give him notice of the time and place of sale. These decisions are based upon the principle, that where personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledger; the special property and the possession, or right of possession, being in the pledgee; the pledger having the right to restoration of the property on payment of the debt. In the cases of the transfers of stock, the Courts say, that the special property only passed; that the contemporaneous paper, or note in writing, showed that the transfer, although absolute on its face, did not convey the *general property*, or the *legal title* to the property, but it was resorted to from *necessity, arising [163] from the by-laws of the corporations of whose capital stock these shares were a part, which required the transfer of the certificate to be made upon their books; and that this

absolute transfer was necessary to give the creditor possession of the stock, and for his own protection. So in the matter of the cases of boots and shoes, the general property and the legal title to the property remained in the debtor. The character of the several transfers in each of these cases is qualified, and this is shown by the contracts in writing; and in each case the right to sell was restricted and denied, except in case of non-performance; and undoubtedly the decisions were governed by the written contract in each case: none of them can therefore be said to be analogous to the case at bar. The decision in *Wilson v. Little*, by the New York Court of Appeals, and which reviews both of the other cases, is placed distinctly upon the written contract. The Court says, in addition to what has been above quoted, "The general property which the pledger is said usually to retain is nothing more than a legal right to the restoration of the thing pledged, on payment of the debt. Upon a fair construction of the note and the transfer, taken together, this right was in the plaintiff," etc. The transfer in that case being absolute, it was qualified and explained only by the contemporaneous papers, which declared it to be a deposit, and restricted the right to sell. In the present case, the transfer is absolute, and there is nothing adduced on the part of the plaintiff to qualify or explain it, except the drafts which were drawn, at or about the time of the transfer by Hyatt, Cox & Sheldon, on the defendant: these drafts we will examine presently. The answer, it is true, as we have already seen, admits that the securities were held as collateral, but the admission is coupled with the averment that the defendant had the full power to sell. They cannot be separated: the admission and averment, if taken at all, must be taken together; and giving the parol testimony of the witness, Squiers, the fullest weight that can be asked for it, viz., that the defendant held the scrip, etc., as collateral, and yet it by no means follows that the defendant has not the right to sell. The plaintiff had yet something more to do to maintain his suit than merely to establish that the securities were held as collateral, for, as I have already said, the *holding as collateral was not inconsistent with having the power to

sell: the vital point was to show that this power, so absolute in terms, had been restricted in fact, in order to bring the case within the ruling above cited, and to sustain the charge of a fraudulent conversion; for, as the case stands at this stage of the examination, the defendant held the scrip as collateral, but with the full, absolute, and unrestricted right to sell, or convey, or convert, at his pleasure, and to the best of his judgment, being answerable only for the surplus of the proceeds after reimbursing himself, and for his diligence and good faith in the performance of his trust.

The Court below may have regarded the parol testimony alone as sufficient to establish the fact that the defendant received the scrip and requisitions as collateral security, and to justify the conclusion as a conclusion of law, that being so received, the defendant had no legal authority to sell without demand of payment and notice. Such would be a correct conclusion in case of a strict pledge, where no power to sell had been given, or where it was restricted; but it would be neither safe nor sound where an express and unrestricted power had been given by an absolute transfer. I have not attempted to consider the question of the admissibility of the parol testimony to give effect to the supposed intention of the parties to the contract, for the reason that I attach no importance to it: it simply establishes, if it establishes anything, what the defendant fully concedes.

I have carefully examined the other authorities cited by the respondent, viz., *Coddington v. Bay*, 20 Johns. 640; *Chitty on Bills*; *Bristol v. Sprague*, 8 Wend. 424; *Wardell v. Howell*, 9 Wend. 170; *Stalker v. McDonald*, 6 Hill, 93; *Bissel v. Drake*, 19 Johns. 66; *Jenness v. Bean*, 10 N. H. 264; *Williams v. Little*, 11 N. H. 71; *Presdt. Wash. Bk. v. Lewis, etc.*, 22 Pick. 24. The majority of these cases are to the effect, "that to protect the holder of a negotiable security, which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security, or nominally in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security *upon [165] the faith of the paper thus improperly transferred to

him, without any fault on his part." These cases all follow the rule laid down in *Coddington v. Bay*, which is regarded as the leading case, and in which the English authorities upon the point in controversy are fully considered. In most of the cases, the notes in question were strictly pledged as collateral security. I cannot see for what purpose they are quoted. In none of them was the point decided as to whether the pledging of the collateral security gave the right to sell; and none of them consider the character of a pledge, further than to say, as in *Jenness v. Bean*, "that where a negotiable promissory note is endorsed in pledge as a collateral security for a debt due from the endorser to the endorsee, the endorsee takes it like a chose in action, *not negotiable*, subject to all defences to which it would be subject in the hands of the endorser at the time when notice is given of the endorsement."

This doctrine is a familiar one, and however correct, can have no bearing here, unless it is to show that a note endorsed over as a collateral security, is a pledge, that the reporter calls it a pledge, the counsel calls it a pledge, and the Court calls it a pledge; but all that don't make it a pledge; and if it were a pledge, the *right of sale* is not raised or questioned. These authorities are not even serviceable to show that parol testimony may be introduced to prove, as between the parties endorser and endorsee, that a promissory note is held as collateral. In those cases, the defence went to the *want of consideration*, and parol testimony was admitted, to show the want of valuable consideration set up in defence; and the rule is, that where a note is thus passed to secure a pre-existing debt, it is taken by the endorsee, subject to all defences.

The case of *Hays v. Riddle*, Sandf. 249, was an action in trover for the conversion of a bond payable to bearer. The bond in suit, with two others, was left to secure an advance of \$23,000 due from the defendant to plaintiffs. The defendant received the bond from the plaintiffs *for the purpose of getting it exchanged* for Erie Railroad Stock. He was to bring the stock back *as a substituted security*. It was held, that where the pledger of a bond delivers it to the

[166] *pledgee *for a particular purpose*, as to be exchanged

for stock, and to return the latter, and the pledgee *converts the bond to his own use*, the pledger may maintain trover for the bond. Surely there is no kind of analogy between that case and this; besides, the only point decided was, that the plaintiff could maintain his action without making a demand.

None of these last-cited authorities, therefore, throw any light upon the particular point in issue here, which is as to the authority of the defendant to sell. And for additional light upon this subject, I now turn to the drafts drawn by Hyatt, Cox & Sheldon on the defendant and cashed by him. A careful and deliberate examination of the language of these drafts has fully satisfied my mind that they contemplated the selling, and recognized the right of selling in the defendant, of the securities placed in his hands. What other construction shall be placed upon it? What other sense or meaning can be fairly attributed to the words employed? What did Hyatt, Cox & Sheldon intend to convey to the mind of the defendant, when they directed him to pay their drafts "when in funds from the proceeds of the securities placed in your hands?" And how was the defendant to be in *funds* from the *proceeds* of the securities, unless from sale of them?

These drafts were the contemporaneous papers in the transaction which qualified and explained the transfer of the securities, and they should be taken and construed together, according to the rule laid down in *Wilson v. Little*, and upon a fair construction of the language of the drafts, and the transfers, taken together, construing the words employed in the drafts according to their legal signification, and their plain, sensible, and practical import, it is impossible for me to arrive at any other conclusion, than that authority was given to the defendant to sell, and convert the securities into cash. Taking the drafts, or the transfers and assignments, together, and there is no longer any doubt, mystery, or obscurity in this case. The intention of the parties is made transparent; the authority of the defendant to sell is rendered perfectly clear and unclouded; and the reason why the plaintiff did not dissent to, or question, the correctness of the defendant's books in which the proceeds of the sales of the*se- [167]

curities were carried to his credit, and which accounts and books he frequently inspected, is made manifest.

The reason and justice of this case seem to me, also, to be in harmony with this view, and I cannot but yield my concurrence and assent to the opinion and conclusion of my learned associate, to the effect, "that an express stipulation in writing could not exhibit more clearly the authority of the defendant to sell the securities than does the language of these drafts."

THE PEOPLE, Ex rel. SMITH, Appellant, v. WILLIAM B. OLDS, Respondent.

¹ **MANDAMUS, WHEN IT LIES.**—A mandamus will not lie where there is any other specific, speedy, and adequate remedy.

IDEM, WHEN ISSUED.—The statute of this State is a re-affirmance of the principles of the common law, as regards the writ of mandamus, and sec. 468 provides, that it shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law—*e converso*, it shall issue in no other.

² **TITLE TO OFFICE.**—Title to an office cannot be tried upon a mandamus, neither at common law, nor under the statute.

USURPATION OF OFFICE.—The Practice Act provides a remedy "against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise within the State."

MANDAMUS, REMEDY BY.—A mandamus can give no right, but may be resorted to to put a party in a position to assert his right.

IDEM, WHEN WILL NOT LIE.—It will not lie where the office claimed is full, or against an incumbent *de facto*, unless the party be without remedy.

MANDAMUS AND QUO WARRANTO DISTINGUISHED.—The distinction between the writs of mandamus and *quo warranto*, as held in England, is not abolished by the statutes of this State, but, on the contrary, is recognized.

APPEAL from the Fourth Judicial District.

The relator claimed to be duly elected to the office of Clerk of the Superior Court of San Francisco, and in his petition set forth, on oath, the grounds of his claim at length,

¹ Cited, what writ will direct, *Merced M. Co. v. Fremont*, 7 Cal. 183; *People v. Bell*, 4 Cal. 177; *Russell v. Elliott*, 2 Cal. 245.

² Cited, *Satterlee v. San Francisco*, 23 Cal. 320. See *Turner v. Melony*, 13 Cal. 621.

and the proceedings taken by him, to qualify and obtain possession of the *records, papers, etc, connected [168] therewith, of the defendant, then sitting and acting as Clerk of the said Court, who protested against the claim of the relator, on account of the insufficiency of the evidence of his claim, as exhibited by him. The relator further claimed damages from the defendant by reason of his unlawful withholding of the office, etc., \$500. And prays the Court for an alternative mandamus to issue to the defendant, commanding him to turn over the records of the office to the relator, and to allow him to enter upon the discharge of the duties of said office, or show cause why he should not do so.

The Court granted the writ.

The defendant, in his answer, takes divers exceptions to the form of the proceedings, and to the writ, and states these as cause of demurrer, and claims to hold the office, and exercise its duties, under the appointment of the Judge of the Court, and objects his joining a claim for damages in a mandatory suit, etc.; and denies the election of the relator to the office, and the sufficiency of the evidence produced by him to sustain his claim, etc.; and denies that the relator has any right to any fee received by him, or that he, the defendant, unlawfully holds the office, and excludes the relator.

And charges that the relator's election was a fraud upon the electors, and of no validity whatever; and, therefore, that the writ was wrongfully and improperly issued, and prays to be dismissed, and for judgment for costs, etc.

On the hearing of the case, the Court gave judgment for the defendant, with costs, on the ground that "*this proceeding is not the proper remedy*;" and the relator took this appeal.

Bates and Gorham, for Relator.

The writ of mandamus is the proper writ or form of remedy, both at common law and under the Statute of this State, for the admission of, and trying the right of, a party to an office, when the same is filled, and unlawfully withheld and precluded by another; and the Court below erred in deciding that this writ was not the proper remedy. (3 Hen. & Mun. 1 Va.; 20 Pick. 495; 5 Hill, 626; 3 Hill, 4; Sec. 468, Cal. 1851, Pr.

[169] *Act; 3 Blacks. R. 265, 110, and note; 6 East, 362; 2 Esp. N. P. 666.

If the defendant disputes the title of the relator, and wishes to go behind the certificate of election, or the returns, under this proceeding he has ample remedy by the 472d and 476th sections of the Practice Act.

The distinction between the writ of quo warranto and that of mandamus in England had its origin in the statutes of Anne and George I., which are not in force here. The distinction here is merely arbitrary, and is so held in the Virginia case; and this is so on both principle and reason. The statute of this State has given to the mandamus all the functions possessed by the quo warranto, and is intended to abolish all the nice distinctions between the two writs, and remove the boundaries existing between them. (See Practice Act, 472d and 476th sections.)

Our statute has made the writ of quo warranto a specific remedy, which it is not at common law. It has also given co-extensive functions to the writ of mandamus, and the reason and force of the rule, that whenever quo warranto will lie, mandamus will not, is destroyed by the statute. (See the cases *Casserly v. Fitch*; *The Virginia Case*, 5 Hill, and 20 Pickering, above cited.) And as the objection is technical, not affecting the merits, the statute should be liberally construed. The 467th section points out specifically the functions of the writ, and in the latter clause of the section, the case of the parties before the Court is provided for.

Cooke, for Defendant.

The relator has mistaken his remedy: the writ of mandamus lies only in cases where it is necessary to prevent a failure of justice, and where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Civil Prac. Act, sec. 408; 3 Barr, 1265; *People v. Moyer*, 2 Hill, 10, 13 (as to all extraordinary writs); 2 Hill, 27; *Ib.* 367; 1 Hill, 198; *Ib.* 674; 13 Pet, 279; *Ib.* 404; 2 Johns. Cas. 217, 7; 15 Pet. 9; 10 Johns. 484; 10 Wend. 393; 5 Hill, 616; 6 *Ib.* 243; 2 Cow. 444.)

Mandamus gives no right: it lies only to put a party in a

position to assert his right, where, without that, he could not do so. *(3 Shep. N. P. 2291; Stra. 538; 3 [170] Burr. 1421; 2 Stra. 893, 7; Rol. Abr. sec. 4, 8, 7; and see 2 Johns. Ca., 2d ed., 217, 256.)

It will not issue to put one into an office already full. (3 Shep. N. P. 2294, 5; Ib. 217; 2 Johns. 217.)

And the return of the defendant that he is the incumbent of the office, in by a valid appointment, and not lawfully ousted, is a good return.

The remedy of quo warranto is the only one to try the title in this case. (3 Johns. Ca. 79; 5 Hill, 619; Angel and Ames on Corp. 639; 3 Term Rep. 259; 3 Burr. 1454; 4 Ib. 2011; 3 B. & A. 592; L. & E. Rep. 361.)

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This is an application for an alternative mandamus to the defendant, to compel him to hand over to the relator the books and papers of the office of the Clerk of the Superior Court of the City of San Francisco, and to allow him to enter upon the discharge of said office, to which he claims to have been elected.

To the general allegations contained in the application of the relator, the defendant filed a general demurrer, on the ground that the relator should have sought his remedy against the defendant by an action upon information in the nature of a quo warranto, and not by a writ of mandamus; and also a general answer denying the facts on which the election is claimed; to which the relator has demurred and also replied.

The Court below sustained the demurrer and dismissed the petition, on the ground that the proceeding by mandamus was not the proper remedy, and we are asked on appeal to reverse this decision.

It is contended, on the part of the appellant, that the writ of mandamus is the proper remedy both at common law and under the statute of this State; that the statute is explicit, and gives this remedy in precisely such a case as this.

At common law, the proceeding by mandamus was employed as a supplemental and extraordinary writ of a reme-

dial character, and was resorted to early in the annals [171] of English jurisprudence *from the necessity of establishing a residuary method to be used on occasions where the law had provided no other remedy, and where in justice there ought to be one; upon the principle that no right should be without a remedy. According to Lord Mansfield: "If there be a right and no other specified remedy, it will not be denied; in fact, where there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be a matter of public concern, or attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the Court will interpose by mandamus." (*Rex v. Barker*, 3 Burr. 1266, 1267.) By means of this supplementary remedy, also, inferior officers and tribunals are forced to perform their duties. Blackstone describes this writ as, in general, a command issuing in the name of the sovereign authority from a superior court, and directed to any person, corporation, or inferior court of jurisdiction within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty. But all the authorities agree, that it lies only to prevent a failure of justice, and where there is not a specific remedy in the ordinary course of law. To authorize its use, there should not only be a want of specific legal remedy, but also there should be a specific legal right, (see case of *Fish v. Weathermore*, 2 Johns. Ca. 217, 6 notes,) and the right must be perfect, not inchoate. (*The People v. The Trustees of the City of Brooklyn*, 1 Wend. 318.) It is a rule of general application, that where there is any other specific legal remedy for the party complaining, the writ of mandamus will not lie. But where there is no other adequate specific remedy, resort may be had to this high judicial writ. (Per *MORON*, J., 20 Pick. 495.) In *The People v. Stephens*, 5 Hill, 626, a case similar in many respects to the present, being a proceeding where the relator claimed to be the Clerk of the City of Brooklyn, and sought by this writ to be put in possession of the books and papers belonging to the office, while the defendant was actually in the possession of the office under

color of lawful right to hold it, BRONSON, Justice, in delivering the opinion of the Court, remarks that "where the party has another specific remedy, a mandamus will not be granted. This *(he says) has been decided a hundred [172] times, and the rule is so well settled that it would be a waste of time and paper to cite the books. Many of the cases are collected in Angel and Ames on Corp. 577-8, 2d ed.;" and Judge COWEN, without passing upon the other questions, concurred in giving judgment for the defendant on the express ground, "that the relator, if he was clerk, had another specific legal remedy for obtaining the books and papers." It is still insisted that many authorities are the other way, and according to Mr. Dane, 6 Davis's Abr. 326, the authorities, both English and American, are much in favor of mandamus, especially the more modern cases; and prominent among the cases cited, and upon which the relator most confidently relies, is that of *Dew v. The Judges of Sweet Springs*, etc., 3 Hen. & M. 1. We have carefully examined all the authorities cited by the appellants upon this subject within our reach, and have found that in no case where the writ of mandamus has been suffered to go has it appeared that there was any other more speedy or adequate remedy. In the Virginia case, as Judge BRONSON properly suggests, 5 Hill, 626, it did not appear that the relator had any other adequate remedy, and indeed the decision rested upon the ground that there was no other remedy so well adapted to the nature of that case; and generally, where the authorities are claimed to be in favor of mandamus, it will be found that they arise when *quo warranto* is not regarded as affording a *specific* remedy; and, indeed, it may be said, that all the exceptions to the general rule depend upon an absence of another specific, adequate, or speedy legal remedy, or arise from the nature of the remedy which is to exclude the application of the writ; as, for example, where such remedy is incompetent to afford relief to the applicant upon the very subject-matter of his application. Therefore, it has been said, that if the party have another speedy, specific legal remedy, yet if it be obsolete, as *in assize*, this writ will lie; so, also, if such remedy be extremely tedious, (as it sometimes occurs, where it is by

quo warranto,) it will lie, since in such cases the remedy is inadequate to do justice. (10 Wend. 396, per NELSON, al.) And it is said that mandamus is the proper process for restoring a person to an office from which he has been unjustly removed; but that is where, for example, a person has [173] *been removed from an office by a corporation without authority, or where a Court has unlawfully removed a clerk; for in such case there is no other specific remedy, and it is used to compel the corporation or court to do right, and to restore the party to an office from which he has thus been removed. Such was the purpose for which it was resorted to in the Virginia case: it was to restore the relator to an office he had once exercised and enjoyed, to which his title was clear, and of which he had been unlawfully deprived by the Judges. In the case in 20 Pick., cited by the appellant, the relator asked for a mandamus to compel the Board of Examiners to give him a certificate of election, and it was granted, upon the ground that no other remedy would reach the evil; but it was expressly stated by the Court that it would not have been granted had there been any other adequate specific remedy.

Judge NELSON, whose dissenting opinion, in 5 Hill, is relied upon by the appellants, has repeatedly maintained this doctrine. (See 10 Wend. 395.) He says: "The proposition is, I believe, universally true, that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice." He further observes: "The principle which seems to lie at the foundation of applications for this writ and the use of it is, that whenever a legal right exists, the party is entitled to a legal remedy, and when all others fail, the aid of this may be invoked." And he cites as authority upon this point, 3 Burr. 1267; 1 T. R. 404; 3 Ib. 651; Cowp. 378; Per BULLER, J., 4 Bacon Abr. tit. Mandamus, 496; 12 Johns. 415; 19 Ib. 259; 1 Cowp. 419. Again, in 25 Wend. 680, NELSON, (then Chief Justice,) says: "After full consideration, I feel persuaded that the relator has a perfect legal remedy by action, which upon settled principles forbids a resort to the writ of mandamus."

Indeed, all the cases cited by the appellants, and which it

is claimed overrule this position, will be found to depend upon the ground that no other remedy is adequate, specific, or proper; and the conclusion at which we have arrived is, that the established rule of the common law upon this subject stands unshaken and unimpaired by any of the modern cases. But if any doubt can remain upon this question, or if the mere weight of authority, *either as re- [174] regards the number of authorities, or the respectability of their source, is against the proposition, the statutes of this State unquestionably settle the point beyond all further controversy.

The statute, which we regard as an embodiment and reaffirmance of this view of the principle of the common law, provides, sec. 468 of the Practice Act, that "this writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." And, *e converso*, it shall issue in no other. The ground assumed by the appellants, is, that although another remedy, plain, adequate, and speedy, in the ordinary course of law, does exist, still resort may be had to this writ. We cannot admit that such was the intention of the Legislature in framing this enactment, but conceive that it was intended to give statutory authority and validity to a process which is regarded as a remedy of an extraordinary and supplemental character, and to define its functions and limit its power in accordance with the recognized and established principles of the common law; and, viewed in this light, it is in perfect harmony and consonance with those principles.

But there is another reason why mandamus should not be resorted to in a case like the present; and as this appeal has been urged with much earnestness, we propose to review this question in all its bearings, believing that public policy and public security can best be subserved by a final disposition of this matter, and in order, not only that the questions involved in this instance shall be fully considered, but that fruitless litigation may hereafter be avoided in similar cases.

This is professedly a proceeding under the statute of this State to compel the admission of the relator to the use and enjoyment of an office, to which he is *entitled*, and from which

he is *unlawfully* precluded, but in reality, it is a proceeding to try the title to the office: both parties claiming it, and the defendant, who has been admitted and sworn, being in possession, and contending that he is the lawful incumbent. The relator demands the writ of mandamus, to compel the defendant to hand over to him the books and papers, and to allow him to enter upon the discharge of the duties of the [175] office, upon the ground that he is **entitled* to it, and that he is *unlawfully* precluded from the enjoyment of it by the defendant.

In the first place, this cannot be said without begging the question of title, and while the defendant is actually in possession of the office, duly sworn and admitted, and exercising the duties as officer *de facto*, he is *prima facie* entitled to it: such is the presumption of law; and in the second place, while the defendant is thus in the office, under the color of lawful right, and claiming to be the lawful incumbent, his title to the office cannot be tried upon mandamus; and thirdly, the statute has provided a plain, speedy, and adequate remedy at law by the Practice Act, which provides for an action "against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise within the State."

We consider that it is a well-settled rule of the common law, that the title to an office cannot be tried by mandamus. A mandamus can give no right, not even the right of possession, although it may enforce one. It may be resorted to for the purpose of putting a claimant in a position to assert his right, when without that, he could not do so. It may be used to compel an officer of an election to give a claimant a certificate of his election, but this, if he obtains it, will not necessarily oust the incumbent, or give the claimant possession of the office. So, too, it will lie upon the application of a person showing a *prima facie* right to an office, who seeks to have the proper oath of office administered to him, to the end that it may place him in a condition to assert his legal rights, but he would still have to resort to quo warranto to oust the incumbent and get possession of the office.

The authorities to sustain the position, that mandamus will

not lie, when the office is full, are very numerous, but we propose to cite only a few of them. The whole subject has been considered in the notes appended to the report of *Fish v. Weatherwax*, 2 Johns. Ca. 217, in which, among others, is cited the following: "Though a mandamus to admit to an office gives no title, yet it will not be granted, when there is an officer *de facto*, though that officer be in under a temporary mandamus, obtained by collusion and claim under the same election with the applicant; for the remedy is, to try the title to the office *de facto* *or on information in [176] the nature of a quo warranto." (Angel and Ames on Corp. 3d ed. 639.)

"A mandamus to a Mayor to admit one to the office of Recorder, was refused, because there was a Recorder *de facto*, and it was therefore a decisive answer to the application, that there was another remedy, by an information in the nature of a quo warranto, by which the title of the officer in possession could be tried." (*Rex v. Mayor of Colchester*, 2 Term R. 259.) So of one to a Bishop, to compel him to license a curate of an augmented curacy, where there was a cross-nomination; for the party had a specific legal remedy by *quare impedit*. (*Rex v. Bishop of Chester*, 1 T. R. 396.) "If *quare impedit* does lie, mandamus does not," per Lord MANSFIELD, in *Powel v. Milbank*, Cowp. 103. But though an office be full, still if quo warranto does not lie, a mandamus will be granted, upon the principle that the party shall not be without a remedy. (*Rex v. Mayor of Colchester*, *infra*.) The American authorities also support this position. The case from 3 Johns. Ca. 379, is directly in point. The Court there say that "where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy, in the first instance, is by an information in the nature of a quo warranto, by which the rights of the parties may be tried." His authority is amply sustained by others. It is commented upon by Justice MORRIS, in 20 Pick., but he does not rule against it, the case being decided upon another point: he, however, concurs with Mr. DANE, and refers to the Virginia case; but we have already suffi-

ciently considered that authority. In the *People v. Stephens*, 5 Hill, BRONSON, Justice, says, after stating the facts of the case: "Enough has been stated to show that the relator proposes upon this writ of mandamus for the delivery of papers, to try the title to the office of Clerk. The relator has several difficulties to encounter, which I think insuperable; and in the first place, the defendant is actually in the office of Clerk under color of lawful right to hold it. A writ of mandamus is not the proper mode of trying it. The relator should have proceeded by an information in the nature of a quo warranto.

In *The King v. The Corporation of Bedford*, a mandamus was granted; but it was for the reason that a quo warranto would not lie in that particular case, and there was no other adequate remedy. The relator should first establish his right to the office, by a direct proceeding for that purpose, and then his right to the books and papers would follow as a matter of course."

There are other cases to show that though an office be full, still if quo warranto does not lie, a mandamus will be granted; but this is upon the principle that the party shall not be without a remedy.

In the present case, it cannot be said that the relator is without a remedy. The statute is ample, and furnishes not only a specific, but adequate and speedy remedy. It was the intention of the propounders of the law that it should be so, and we have not yet discovered that the remedy is deficient in any respect. Until it shall appear that the relator is without a plain, speedy, and adequate remedy, in the ordinary course of law, we must conclude that the mandamus was not proper in the premises or appropriate to the relief sought. We cannot accede to the proposition that the distinction between the two writs in force in England, and which are said to have originated under the statutes of Anne and George I., have been abolished by our statute: the very reverse of this is the fact, for not only is the distinction recognized, but if it had never existed at common law, it might truly be said to have been created by the language of our statute. And, conceding that the decision in the Virginia case, the dissenting opinion of Chief Justice NELSON, in 5 Hill, and the ruling of

the Supreme Court of Massachusetts, in 20 Pick., shall be considered as sound law, yet they do not conflict with our interpretation of the statute of this State, which, as we have already said, provides an ample, speedy, and adequate remedy; especially so, since the construction put upon it by this Court, in *The People, ex relatione, Casserly v. Fitch*, 1 Cal. 519.

It is finally urged that as the defence is technical, and does not address itself to the merits of the case, or the conscience and equity of the court, the statute regulating the issuance of a mandamus ought to receive a liberal interpretation. In reply to this, we have but to say that the appeal is not brought upon the ground that equitable relief had been sought and denied, but *from a decision which it is asserted [178] was erroneous in law, and we sit here to review the decision on questions of law alone, and to decide what the law is, to give a correct interpretation of the statute under which the relator has, by his own choice and selection, proceeded. For the purpose of affording relief to him, we are asked by this appeal, in effect, if not in terms, to proceed upon the maxim, *Boni judices est ampliare jurisdictionem*, as the learned Judges in the Virginia case seem to have done, relying upon the peculiar character and circumstances of the case before them for their justification; but with all due deference be it said, we cannot see how we can follow their example and conform to this maxim in the present case, without a usurpation that would necessarily destroy alike the reason and justice of the maxim; for, how can we amplify the remedy by mandamus which is limited by statute, without assuming jurisdiction? The hardship of a particular case, or the difficulties which surround it, cannot be urged in justification of an innovation upon the settled rules of law, or the principle of correct interpretation, established by the experience and confirmed by the approbation of ages. We have no right, even if we had the inclination, to sweep away the established rules of law, or to enlarge the remedy provided and limited by the language of the statute, for the purpose of relieving the relator, by what is termed a "liberal interpretation:" to do so, would be to overstep the bounds of

certainty, and wander forth in every case in pursuit of some new light to guide us in the path of justice.

After full and careful examination of this case, we are satisfied that the decision of the Court below was correct, and therefore order that it be affirmed.

[179] *WHITMAN, Respondent, v. JNO. A. SUTTER, Appellant.

APPEAL, AFFIRMANCE.—Facts not renewable on appeal.

APPEAL from the Judicial District, Yuba County.

Per curiam.—This is an appeal from a judgment rendered on the verdict of a jury. As this Court has no power to revise the facts, the judgment must be affirmed.

CALL et al., Respondents, v. HASTINGS, Appellant.

¹ CONVEYANCES, INTENT OF STATUTE.—The evident intention of the statute providing for the proof and registration of conveyances, is to protect subsequent purchasers, without notice, either actual or constructive.

NEGLIGENCE, WHEN A LEGAL FRAUD.—At common law, negligence in a prior purchaser or mortgagee, such as leads to imposition upon an innocent party, is regarded as a legal fraud.

² CONSTRUCTIVE NOTICE, STATUTE CONSTRUED.—The doctrine of constructive notice has always been regarded as a harsh necessity; and the statutes which create it have always been subjected to the most rigid construction.

³ MORTGAGE, LOSS OF PRIORITY BY FAILURE TO RECORD.—A mortgage made anterior to the passage of the act concerning conveyances, was not recorded in accordance with the provisions of the 41st section of the said act. *Held*, that it lost its priority as against a subsequent purchaser without notice.

APPEAL from the Sixth Judicial District, Sacramento County.

¹ Approved, *Bird v. Dennison*, 7 Cal. 804. See *Bryan v. Ramirez*, 38 Cal. 461.

² Approved, *Chamberlain v. Bell*, 7 Cal. 294; *Bird v. Dennison*, 7 Cal. 309. See *Partridge v. McKenney*, 10 Cal. 184.

³ Approved, *Stafford v. Lick*, 7 Cal. 487; *Clark v. Troy*, 20 Cal. 223; *Anderson v. Fish*, 36 Cal. 634. Commented on, *Stafford v. Lick*, 7 Cal. 498. And see *Page v. Rogers*, 31 Cal. 320; *Graff v. Middleton*, 43 Cal. 243; *Frey v. Clifford*, 44 Cal. 343.

This action was brought to recover the possession of the real estate in the complaint described, in the possession of the defendant.

Both parties claimed title under Gideon B. Stephens.

The plaintiffs claimed by sheriff's deed, dated the 14th December, 1850, of the property in dispute.

Stephens had executed, on the 19th February, 1850, to one John Eddy, a mortgage of the premises, which mortgage was first in date, and which plaintiffs averred was the first incumbrance at the time of the sale. It was acknowledged before J. A. Thomas, Judge of Sacramento District.

J. Birdsell, the Recorder of Sacramento, was produced by *plaintiffs as a witness, who testified that he [180] had the record of the mortgage from Stephens to Eddy, of February, 10th, 1850; that this record was one turned over to witness by the Clerk of the County as part of the records of the county—not a record made by witness, but a book recording conveyances previous to the passage of the State laws regulating conveyances. Witness had charge of all the records of the county, and these books A and B, and part of C and D, (the books produced,) were made before he went into the office, and were used by him as records. They were kept by the predecessor of witness, Mr. Schoolcraft, and in tracing titles, were always included in the search; that Schoolcraft was the *acting* Recorder of the County at the time he went into office.

Upon the above mortgage Eddy obtained judgment against Stephens, 2d November, 1850, and the property embraced by it was sold by the sheriff as above stated, and bought by the plaintiffs, to whom the sheriff conveyed 15th December, 1850: deed acknowledged the same day, and recorded January 8th, 1851.

The defendant denies in his answer that the plaintiffs had purchased any interest in the premises by the said sheriff's sale of 15th December, 1850, and denies that Stephens had any interest in the property at the time of sale, and sets up that he, the defendant, claims under a decree of a foreclosure of another mortgage from Stephens, about the 23d July, 1850, which he avers was the first mortgage legally executed and re-

corded in the said county; and that the mortgagee of the last mortgage had no notice of the existence of any prior mortgage outstanding. Defendant further admits his possession of the property, and insists upon his right to it as against the plaintiffs, etc.

The mortgage under which defendant claims was a second mortgage, executed by Stephens to one Maynard, recorded 21st May, 1850, of the same property previously mortgaged to Eddy.

The question in the case was, whether the record of the first mortgage protected the mortgagee against the subsequent mortgage creditor.

The appeal was taken by plaintiffs from a judgment entered for defendant, without prejudice, by agreement of parties.

[181] **Robinson*, for Appellant.

The mortgage of February, 1850, was duly recorded in the office of H. A. Schoolcraft, then acting as recorder of deeds and mortgages, etc., in the jurisdiction of Sacramento, to which office he had been elected at a popular election in 1849.

In May, 1850, Stephens mortgaged the property again, and this mortgage (to Maynard) was duly recorded under the recent recording act: and under a judgment, foreclosure, and sale, upon this mortgage, defendant is in possession, and holds.

The recording of the mortgage in the office of Schoolcraft was direct constructive notice of the incumbrance, he being *de facto* in the exercise of the functions of the office of recorder.

If such office of recorder existed under Mexican law, Schoolcraft being *de facto* the recorder, his acts have the same validity as if he was in the rightful exercise of the office.

If there was no such office known to the Mexican law, then the first mortgage in point of time has the better equity.

Apart from this consideration, our own statutes give validity to the records of mortgages recorded in the Schoolcraft records. (Acts of April 13 and 16, 1850, and of March 2,

1850, chap. 100, sec. 42, p. 253; ch. 23, sec. 39, p. 81; ch. 93, sec. 1, 2, p. 218.)

Hastings, for Respondents.

Schoolcraft's books were not records: they were not kept by an alcalde, notary, or any other officer. An office book must be authorized by a law of some State. (2 Bow. Dec. 203, 209.) The office of recorder of Sacramento City did not exist by any statute, or by the civil or common law. The plaintiffs therefore failed in their action.

The mortgage was void according to Mexican civil law; and was a mere personal contract and a private act. A *conventional* mortgage must be executed by an act, in writing, before a notary public. (Smidt's Civil Law of Spain, 181.) The statute requires compliance with the law at the time in force. (Stat. 1851, p. 253, sec. 42.)

Plaintiffs' mortgage was void for want of registry. Registry laws have been established in all civil law countries, for the inscription and publication of mortgages. And they universally *establish an "office of mortgages;" [182] and without registration they are void against all third persons. (See McKelery, 368.)

These offices were established in the Mexican Republic, and were to be kept by the *Escribanos* of Districts, or by some of the judiciary. (See How's Translation, A.) Schoolcraft comes within no requisition of the law.

"Whenever the age of the mortgages is proved by the documents, he who proves by a public or a *quasi* public document has the preference over every mortgagee whose means of proof is only a private instrument, although it be of older date." (Mauldy, Civil Law, 391.)

The recording of defendant's mortgage was a public act, within the rule cited.

Plaintiffs permitted the defendant's mortgage to be recorded, foreclosed, and the premises sold by the sheriff, more than half a year, and have lost their priority by negligence. (See Mauldy Civil Law, 392, note, and authorities cited.)

Why did not plaintiffs record their deed in the legal office? This is required in all cases as respects third persons. (See

stat. concerning Conveyances, 1850, sec. 24, 241.) All conveyances executed according to former law to be recorded. (Ib.)

Neither can the plaintiffs recover at common law, in the absence of laws of registration: in that case their duty was to take possession of the land or the title papers. (2 Pow. on Mortgages, 451, note; Roberts on Fraud, 550; 1 T. Rep. 762.)

A registration not in strict compliance with law, is a nullity. (1 Sto. Eq. Jur., sec. 404; 1 McLean, 527.)

Stephens had no right at the date of the levy: the plaintiffs therefore purchased nothing.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

It is unnecessary to decide whether the mortgage under which the plaintiffs claim, was valid under the Mexican municipal laws which prevailed, at the time it was made. Its validity may be conceded, and if so, it not only was unaffected, but was specifically protected by the act concerning conveyances, passed April 16, 1850.

[183] *That act, however, introduced a new rule for the government of these contracts, not as affecting their validity, but in respect to their relation to the rights of other parties which might afterwards grow up.

The act referred to, after providing for the proof and registration of conveyances, declares: "Every such conveyance, certified and recorded in the manner prescribed in this act, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

The evident intention of the statute seems to be to protect subsequent purchasers without notice, actual or constructive. And such is the rule at common law, where registration is not notice, whenever the prior purchaser or mortgagee is guilty of such negligence as leads to imposition upon an innocent party, for in such cases the negligence is regarded as a legal fraud.

In this case, it appears that the plaintiffs took none of the precautions which would have answered to put the defendant on his guard. He left the mortgagor in actual possession of the mortgaged premises, and of the title deeds to the property, allowed the law day of the mortgage to pass for nearly a year without taking action, although the time of credit specified by the mortgage was for less than ten days, and although the terms of the mortgage provided to the mortgagee a power of absolute sale in default of payment. The mortgage under which the defendant claims was made after the law day of the first mortgage had gone by.

A mere recital of these facts conclusively determines that the plaintiffs' claim must yield to the defendant's, unless he is protected by the doctrine of constructive notice. This doctrine has always been regarded as a harsh necessity, and the statutes which create it have been always subjected to the most rigid construction.

I have shown that the act concerning conveyances protected the first mortgage as far as its validity was concerned, but that protection did not make it notice to those who might become purchasers subsequent to the passage of the law. On the *contrary, the act, in positive [184] terms, required that it should be recorded according to the provisions of the act. The 41st section declares "all conveyances of real estate heretofore made and acknowledged, or proved according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this act."

By the 30th section, the term "conveyance," as used in the act, is made to embrace mortgages.

It is clear that the object of the 41st section was to produce a strict conformity in the registration of all deeds affecting real property within this State, and doubtless the main and strong reason for it was, in a condition of things new to the great body of the people, to afford the utmost facilities for research and information, and thus to diminish the frequency of the application of the doctrines of implied notice.

The conformity demanded is as easy as it could be made.

The new forms of acknowledgment on proof of execution are dispensed with. Nothing was required but the simple registration, and that is imperative. Without this, the first mortgage, although valid and legally executed under the Mexican civil law, under the new act imparted no notice to the subsequent purchaser; and although not in express terms declared to be void as to such subsequent purchaser, yet it is so, not only by the intent of the law, but by the laches, amounting to legal fraud, of the mortgagee.

The judgment is affirmed, with costs.

JULY TERM, 1853.

REPORTS OF CASES

DEFERRED—II

THE SUPREME COURT,

JULY TERM, 1853.

VICENTE PERALTA *v.* AMEDEE MARIEA.
SAME *v.* KELLY. SAME *v.* GUEZ.

CONTINUANCE, AGREEMENT FOR, TO BE IN WRITING.—An agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the Court.

NONSUIT, WHEN SHOULD BE GRANTED.—Where the plaintiff fails to appear and prosecute his suit, and defendant moves a nonsuit, the Court has no alternative but to grant it.

APPEAL from the Third Judicial District for the County of Contra Costa.

This was an appeal from the District Court, who refused a continuance upon the application of one of the attorneys of plaintiff, whose affidavit set forth, that he was engaged as assistant counsel with Colonel J. K. Irving for plaintiff, and that W. C. Jones and ——— Carpenter were attorneys for defendant. That at a former term of this court, a verbal understanding was had between the deponent and said Jones, that the causes should be continued until the commissioners had settled the title of Peralta; and, acting upon the belief and advice of the attorney for defendant, this deponent informed said J. K. Irving, (senior counsel,) that the said agreement was in existence, and that the said causes would not come up for trial, and would be continued; that Carpenter intimated to deponent yesterday (the second day of this term)

that he would take up the cases, and thereupon deponent wrote to Irving to come up and attend to them; and he believes that Irving will be up before the adjournment.

[186] * The affidavit was filed July 7, 1852, and on the same day the defendant (the plaintiff being called, and not appearing) moved for a nonsuit, and the Court ordered judgment accordingly, and for costs.

July 16, defendant appealed.

[The three causes at the head of this report were in like condition upon the record, and were included in this appeal, and the opinion of the Court delivered herein governs them all.]

J. K. Irving and E. Randolph, for Appellant.

Plaintiff was deceived, misled, and surprised by the defendant. He relied upon a verbal agreement between counsel that the causes should be continued from term to term, until the commissioners should have decided upon the validity of Peralta's title to the land in question, and therefore were not in attendance when the nonsuit was ordered.

The act which provides that parties shall not be bound by agreements of their counsel, unless reduced to writing, is for their protection, and should not be permitted to be used against them; and defendant should not be suffered to use an agreement under which they rested in security themselves, to cut off all the plaintiff's rights. The statute means that an attorney cannot bind his client, by any agreement not in writing, and not that he may deceive the adverse party by means of it.

The counsel also argued, that the causes having been removed into the District Court by consent, that Court not having original jurisdiction of the subject-matter, (Forcible Entry and Detainer,) that, therefore, consent did not confer jurisdiction. This question, however, was not considered by the Supreme Court.

Carpentier, for Respondent.

The statute, the rules of Court, and the practice, discoun-

tenance all verbal agreements between attorneys. The affidavit states, that this agreement was made with Mr. Jones; who was not counsel for defendant at the time, but who had purchased an interest with the appellant, and became jointly interested with him as plaintiff in the prosecution of these very suits.

By the 157th sec. of the Pr. Act, p. 75, "either party may *bring the issue to trial, and in the absence [187] of the adverse party, unless the Court for good cause otherwisa direct, may take a dismissal of the action, or a verdict or judgment, as the case may require." Here is matter for the discretion of the Court, but no cause for reversal or appeal. (8 Wend. 47; 8 Johns. 426; 13 Johns. 442.)

The only ground of continuing a cause is the absence of a material witness. (See sec. 158, Pr. Act.) The absence of an attorney is a mere ground of appeal to the discretion of the Court. The affidavit does not allege that the party was not prepared for trial.

As to the jurisdiction of the District Court, see sec. 6, Art. VI. Constitution of California, and the act "Concerning Courts of Justice," passed March 11th, 1851, sec. 23; Laws, 1851, p. 13.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The agreement of counsel in the District Court for a continuance of the cause not having been reduced to writing, could not be regarded by the Court, and upon the failure of the plaintiff to appear and prosecute his suit, the Court could have taken no other action than it did upon the motion of the defendant.

The point made that the District Court had no jurisdiction cannot avail the appellant, who was plaintiff below. That would be only an additional reason to sustain the nonsuit.

If the case was improperly in the District Court, it may be that the action of that Court would have no influence on the plaintiff's case when within the jurisdiction of the proper tribunal; but this question is not necessary to be decided.

Judgment affirmed.

[188] *MANUEL OTERO, Respondent, v. BULLARD,
FIGG & CO., Appellants.

PLEADING, MATTERS OF FORM NOT SUBJECT TO DEMURRER.—Objections to a declaration, when they arise from matters of form, are not the subject of a demurrer.

IDEM, COMPLAINT IN CONVERSION.—In the action of detinue, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment, or finding.

IDEM.—This Court cannot say whether the description of the property might have been more accurate.

APPEAL from the Tenth Judicial District.

This suit was brought for the specific recovery of certain mules, horses, and packing apparatus, and came up on demurrer to the complaint, for causes stated in the arguments of counsel.

Saunders and Edwards, for Appellants.

Defendants demurred to the complaint on several grounds:

1st. That the title did not specify the name of the county, nor that of the Court, other than as the Tenth Judicial District, and cited stats of 1851, p. 56, sec. 39.

2d. That it did not show where either of the parties resides. (Acts of 1851, p. 53, sec. 20.)

3d. It does not describe the property with sufficient certainty: the action is analogous to detinue and replevin, and the property should be described so that the sheriff might apportion it, and place it in the hands of the plaintiff. (1 Chit. on Plead. 113; 3 Bac. Abr. 135, 6; 8 Ib. 553; 3 Bibb. 221.)

4th. No description of the place where the property was taken or detained. (1 Chit. Plead. 148; 8 Bac. Abr. 554.)

There is no averment of *tort* in the taking: it is therefore to be held that defendant's possession was lawful; and therefore there could be no cause of action till after demand, and no demand is averred. (3 Johns. 361; 1 Bac. Abr. 607; 8 Ib. 525.)

The complaint does not aver that plaintiff is entitled to possession: it avers that the property was wrongfully detained, but this is a mere conclusion of law. (1 Chit. Plead.

111, 12, 146; 2 Bibb. 510; 3 Bac. Abr. 135; 8 Ib. 525; 15 Mass. 310, 552.)

*Walker, for Respondent.

[189]

There is no ground for the demurrer. (Pr. Act, sec. 40.)

1. The clause in the 39th sec. requiring the name of the county in the complaint is *directory*, not mandatory.

2. The residence of the parties is not required to be stated under the Practic Act of 1851.

3. The description is sufficient: the brand of the mules is described; and "apparatus for packing" is sufficiently definite.

4. The complaint alleges an unlawful detention.

5. The property is alleged to belong to the plaintiff.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The objections to the declaration arise from matters of form, which are not the subject of demurrer. It is true, that in an action of detinue, it is usual to aver a bailment or finding; but the manner in which the defendant became possessed of the property, has always been held to be mere matter of inducement.

As to the description of the property, it is impossible for us to say whether it could have been more accurate or particular.

There was no error in overruling the demurrer, and the order is affirmed.

*AUGUSTUS MOOR, Respondent. v. TEED and [190]
SEEGARDEN, Appellants.

INSTRUCTIONS IN ACTION FOR MALPRACTICE OF SURGEON.—Where the action was brought against surgeons "for malpractice, by reason of which amputation became necessary," it was held to be error for the Court to instruct the jury, "that if they believe, from the evidence, that the defendants were guilty of negligence, carelessness, or inattention, in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict."

APPEAL from the Tenth Judicial District, Yuba County.

This was an action brought against the defendants, physicians and surgeons, to recover damages for malpractice, by reason of which the plaintiff alleged the amputation of his arm became necessary. The only point considered by this Court is fully set forth in the opinion of the Court.

Field, for Appellants.

Borie and Dana, for Respondent.

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This action is brought against the defendants as surgeons, for alleged malpractice in the treatment of a wounded arm of the plaintiff, by which amputation became necessary.

Among the instructions given to the jury, at the request of the plaintiff, and to which the defendants excepted, was the following:

"That if the jury believe, from the evidence, that the defendants were guilty of negligence, carelessness, or inattention, in their treatment of the plaintiff's wounds, by which the plaintiff was caused great *bodily pain and suffering*, the plaintiff is entitled to a verdict."

In giving this instruction, the Court below erred. The defendants are not sued for causing *bodily pain and suffering* by their negligence or carelessness. They are sued for alleged malpractice, by which amputation became necessary.

The injury complained of is the loss of the arm. [191] If the *amputation was not rendered necessary by any malpractice of the defendants, they were, under the pleadings of the case, entitled to a verdict.

The judgment must be reversed, and the case remanded. Ordered accordingly.

WM. COTES, Respondent, v. CHARLES CAMPBELL,
Appellant.

VARIANCE, WHEN MATERIAL.—Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. O. McKinley and C. Campbell & Co., held, that the variance was important and substantial, and that the District Court erred in admitting it in evidence.

APPEAL from the Third Judicial District.

The respondent in this case sued the appellant in the District Court upon a promissory note alleged to have been signed by him and one McKinley, payable to Davis, and endorsed to plaintiff. Campbell denied the execution of the note on oath. On the trial, the plaintiff offered a note in evidence purporting to be signed by McKinley and C. Campbell & Co. Defendant objected, on the ground that it was not the note described in the complaint. The Court admitted the note, and defendant excepted.

The foregoing facts embrace the only point considered in the Supreme Court.

The case came up on appeal by the defendant.

Crittenden, for Appellant.

Tingley, Ramsey, and Roland, for Respondent.

HEYDENFELDT, Justice, delivered the opinion of the Court.
WELLS, Justice, concurred.

The plaintiff declared upon a note made by one McKinley and one Campbell. To sustain the declaration, he offered in evidence a note signed H. B. McKinley and C. Campbell & Co.

No principle is better settled than that the allegations and *proofs must correspond. In this case the [192] variance was in important and substantial particulars, and is therefore fatal.

The note should have been excluded on the objection of the defendant.

The judgment is reversed, and the cause remanded.

WM. M. CRANE, Respondent, v. JASON BRANNAN,
Appellant.

SUMMONS, SERVICE OF.—Where defendant's attorneys accepted service of the summons, but attached no date, the date of the return of the sheriff was held sufficient.

IDEM, VALIDITY OF.—Where the summons was headed with the words, "District Court," but was issued out of the County Court, under the County Court seal, and tested by the Judge of said court, it was held good as the writ of the County Court.

IDEM, SHERIFF'S RETURN.—Where the place where the writ was served was not stated, but it was directed to the sheriff of San Francisco, and was returned by him served, the Court should have assumed that it was served within his jurisdiction.

JUDGMENT, PRESUMPTIONS.—Where judgment was entered upon a default for \$124 75, and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly, was held to apply to the case, and nothing appearing to the contrary, this Court will presume that the Judge had informed himself as to the matter of complaint, in a proper and regular manner and such judgment will be affirmed.

APPEAL from the Fourth Judicial District.

Jason Brannan was summoned to answer the complaint of William M. Crane, to enforce a mechanic's lien upon the Arcade House, for carpenter's work done to the amount of \$124 75, and costs, filed in this court, within ten days after the service of this writ, concluding, "and if you fail, etc., judgment of default will be taken against you for the sum in the said complaint named. Witness the hand, A. Campbell, Judge of the County Court, this 13th December, 1851. Teste: John E. Addison, Clerk."

At the head of the above writ was written the words "District Court of the Fourth Judicial District."

Clarke, Taylor, and Bickle, acknowledged to have received a copy of complaint and summons in the above-entitled cause, and accepted service for defendant.

[193] *And the sheriff returned that he served the same on the 13th December, 1851, by Clarke, Taylor, and Bickle, attorneys for defendant, accepting service of the same.

On the 14th December, 1851, on motion of plaintiff's attorney, default was entered against defendant, according to the

¹ Cited, *Alderson v. Bell*, 9 Cal. 321; *Montgomery v. Tutt*, 11 Cal. 317. See *Hahn v. Kelly*, 34 Cal. 428; *Blasdel v. Kean*, 8 Nev. 308.

complaint, and the Court ordered judgment against the defendant for \$124 75, and all the costs and charges expended in this behalf; and that the Arcade House, situate, etc., be sold to pay the same, etc., and that the judgment stand as a lien, etc.

The execution was entered satisfied, March 8th, 1852. "And now, on this day, in September Term, present the Hon. A. Campbell, the rule to show cause why the judgment by default, entered 14th December, should not be set aside, rule having been argued by Clarke for defendant and Halliday for plaintiff, it is ordered that the said rule be discharged."

September 24, 1852, defendant appealed to the District Court, from the judgment of said County Court.

And in the District Court, the judgment of the County Court was affirmed the 2d October, 1852.

And defendant appealed to this Court.

Clarke, Taylor, and Bickle, for Appellants.

The summons emanated from the District Court, and cited defendant to appear there.

The *place* of the service does not appear, and therefore it is impossible to say whether the default should be taken at the end of 10, 20, or 40 days. (Pr. Act, sec. 25.)

The sheriff's return is not in conformity to the statute, for it does not state the place of service—(sec. 34 Pr. Act)—nor in its indication of the time of answering (sec. 33.) If the time for answering had expired, then the mode of obtaining judgment was irregular. (Ib. sec. 150.) The clerk in this case should have entered the default, and the Court, upon application, should have heard the proofs—this action calling for special relief—but the Court ordered judgment for the amount claimed. (Ib.)

The amount of costs was left at large, and not specified in the judgment, and is therefore void. If a judgment is uncertain as to the amount, and as to the time of rendition, it is invalid. *(*Miner*, 5; *Jones v. Acre*; 4 *Munf.* [194] 262; 2 *Penn.* 1004; 5 *Halst.* 288; 2 *A. K. Marsh.* 382; *Miner*, 89; *Ib.* 93; 1 *Sten.* 18; 3 *Miss.* 53, 228; *Breese*, 298; 6 *J. J. Marsh.* 549; *Miner*, 185.)

Hambly, for the purchaser, under the execution issued in this case.

The summons has the seal of the County Court, and was tested by the Hon. A. CAMPBELL, Judge of the County Court, and defendant was required to appear there. (*McCormack v. Meason*, 1 Ser. & Raw.)

As to the omission of the *place* of service, see sec. 33 of the Pr. Act.

The case comes under the 1st sec. of the Prac. Act, being "*for the recovery of money*," therefore the default was regularly entered. (See sec. 150.)

The judgment was for \$124 75, and as there was no bill of costs filed, defendant has nothing to complain of: he could have paid that amount and the clerk's fees, and plaintiff could claim no more, not having filed his bill of costs.

The seal of the County Court was to the writ, and it proves itself. Defendant could not have been misled.

The endorsement of service by the counsel waived all irregularities. (5 How. Pr. Rep. 233.)

No motion was made to open or set aside the judgment by defendant, from 24th December, 1851, until September, 1852.

If the objections were good as between plaintiff and defendant, they will not at this day be suffered to disturb a judgment upon which the title of another depends. (See 6 Watts & S. 506.)

The record shows the judgment satisfied: it cannot therefore be disturbed. (14 Johns. 468.)

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

Suit was brought in the County Court of San Francisco County, to enforce a *mechanic's lien*. The summons was served by the sheriff, upon Clarke, Taylor, and Bickle, who undertook, as attorneys for Brannan, to accept service. The attorneys sign the acceptance of service, but attach no date: [195] the sheriff's *return, however, shows service to have been made on the 13th December, 1851. No answer was filed, and a default was taken on the 24th December, and

a judgment entered for the plaintiff. From the judgment of the County Court, defendant appealed to the District Court, where judgment was affirmed. The case is now brought to this Court for review.

The memorandum of "District Court," at the top of the summons, was no part of the writ. It was issued out of the County Court, and tested by the Hon. A. CAMPBELL, Judge of the County Court.

The place where the writ was served is not stated, but the Court should have assumed, as it was directed to the Sheriff of San Francisco, and as it was returned by him served, that it was served within his jurisdiction.

The form of this summons is at least substantially good, and sufficiently indicates the time when the defendant was required to answer.

It appears that default was entered, and that thereupon the Court rendered judgment for \$124 75. Whether or not the Court received and heard any testimony does not appear. But it is a settled rule that every presumption is in favor of the conclusion that a public officer, and particularly a judicial officer, has acted regularly. Nothing appearing to the contrary, we presume the Judge of the County Court informed himself as to the matter of complaint, in a proper and regular manner.

The judgment finds the amount of the claim, and we do not think its validity impaired by not finding the amount of costs, which, at the time of the rendition of judgment, are not generally taxed.

Judgment affirmed.

***CHARLES B. SAMPSON, Respondent, v. T. W. [196]
SCHAEFFER, Appellant.**

ACTION FOR RENT.—Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title; or by one of two litigant parties claiming the land: this action depending not upon the validity of plaintiff's title, but upon a contract express or implied.

IDEM, ALLEGATIONS MATERIAL.—The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, was the allegation of a contract; and this plaintiff is bound to establish, to enable him to succeed.

INSTRUCTIONS IN ACTION FOR USE AND OCCUPATION.—In an action for use and occupation, the Court was asked to instruct the jury "that it was necessary, to enable the plaintiff to recover, that he should show, that the defendant used and occupied the premises by the permission of the plaintiff; and if the jury believe defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant;" which the Court refused. *Held*, that in this the Court erred.

ACTION FOR USE AND OCCUPATION.—No action for use and occupation will lie, where possession is adverse and tortious, for such possession excludes the idea of a contract, which in all cases of this action, must be either express or implied.

LANDLORD AND TENANT, TERMINATION OF TENANCY.—Where the defendant held as tenant under J. S. in his lifetime, under whom, as his heir-at-law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such: *Held*, that this refusal terminated the tenancy, and overweighed the presumption of a contract between him (defendant) and the plaintiff.

STATUTORY CONSTRUCTION.—Under the Practice Act, while the mere forms of proceedings are simplified, all that is substantial in the body of the law is preserved, to give it certainty and logical conclusiveness as a science.

APPEAL from the Fourth Judicial District, Yuba County.

This action was brought to recover the sum of \$1400, alleged to be due from defendant to plaintiff, for the use and occupation of a certain lot of land in the city of Marysville, Yuba county, (lot No. 2, block No. 1, range E,) and particularly described, "at defendant's request, and by the permission of the plaintiff, from the 1st March, 1851, to the 1st May, 1852."

The answer of the defendant denies all indebtedness to the plaintiff for the use and occupation of the said lot, and denies that he used and occupied the said lot from the 1st March, 1851, to the 1st May, 1852, by the permission [197] of the plaintiff, *as alleged, and denies that the said lot now is, or ever has been, the property of the plaintiff.

The cause was tried by the Court, a jury having been waived by the parties. The facts found by the Court, so far as they appear to be material to the understanding of the case, as considered by the Supreme Court, are as follows:

That in the latter part of the year 1848, José M. Ramirez, and John Sampson, purchased of Charles Covellaud, one of

the original ranch holders, the tract of land on which is situate the present city of Marysville, for the price of \$24,000, and went into possession immediately after the purchase. That Ramerez and Sampson divided the property thus purchased, and each took charge of his own. That the city of Marysville was first laid out into streets, etc., in the latter part of 1849, and beginning of 1850. That when the lots were divided, lot No. 2, block 1, range E, fell to John Sampson, who went into possession, and leased the same as his property, in the beginning of 1850. That John Sampson died in September, 1850, and his estate descended to his brothers, William and Charles B. Sampson, his heirs-at-law, who divided the same before the commencement of this suit, and the lot in question, in the partition, fell to the plaintiff, Charles B. Sampson. That on the 14th March, 1850, one Spalding leased the said lot from John Sampson, together with other lots, who sub-let the same to one Loveland, and the latter to the defendant, Shaeffer. That both Spalding and Loveland paid rent to John Sampson, in his lifetime. That the defendant, Shaeffer, went into possession of the lot under Loveland, and whilst he was a tenant of John Sampson, deceased, about the 1st March, 1852, and retained the same in his occupancy until about the 1st May, 1852, and, indeed, up to the present time. That Shaeffer paid rent for the premises for a short time after he went into possession, and afterwards refused to pay any longer, and denied the title of the plaintiff, or his right or authority to control him. That when defendant paid rent to Loveland, he paid it under protest, denying at the same time that he was his landlord.

In the month of May, 1851, the plaintiff brought an action for a forcible and unlawful detainer against defendant to recover the possession, in a Justice's Court, which was afterwards appealed to *the County Court and there [198] tried *de novo* in September, 1851. In both of these courts there were verdicts and judgments for the defendant.

That on the trial of the present action in the District Court, the defendant introduced the record of the above suits as tried in the Justice's Court, and afterwards on appeal in the County Court, and relied on the same as a bar or estoppel to the

present suit, which the counsel for plaintiff objected to, but was admitted by the Court. The defendant was also permitted to prove, by parol evidence, that the question of tenancy was in issue in the above trials, and was litigated between the parties, to which plaintiff objected.

Plaintiff also proved the property worth \$200 per month.

The Court went on to say: "That the answer of defendant in this case, was the equivalent of the plea of the general issue, or *nil debet*, and that under this plea, the evidence of the former suit, and parol testimony that the same point was in issue between the parties, was admitted, as it tended to show a former recovery, and that it was upon this that the defendant chiefly relied to defeat this action," to which exception was taken as above, on the ground that a former recovery, relied upon as a defence, should be pleaded. The Court, however, admitted the testimony with hesitation, and doubt whether, by the statute of 1851, defendant was not bound to have pleaded the "former recovery" to entitle him to give the record in evidence, but held, that to constitute a bar, such recovery must consist "of the same matter, and be between the same parties," and "can be final only for its own proper purposes and object with reference to the subject-matter of the suit." That the object of plaintiff in the statutory suit was to recover possession and damages for the unlawful holding over. In this suit it is entirely different, and is to recover for the value of the use and occupation; and if the question of tenancy did arise in the former suit, it did not appear that it was the only question at issue, and the case might have turned on other points and questions. For anything that appears, the defendant may have pleaded payment, an unexpired lease, etc. But neither is an action of a lower grade a bar to one of a higher grade. That of forcible [199] entry would be no bar *to ejectment: so the statutory action arose *ex delicto*, this *ex contractu*.

In this view of the case, the Court gave judgment for plaintiff for \$1400 and costs, from which defendant appealed.

Field, for Appellant.

To sanction the action for use and occupation, the plaintiff

must show a *permissive* occupation by defendant, under John Sampson, in contradistinction to a *tortious* one; that is, he must establish a *tenancy*. Whatever goes to show that defendant did not occupy as a tenant, goes to defeat the action: the record in the case of forcible entry and detainer was conclusive of this, and was therefore admissible in evidence. It also shows that the occupancy of defendant was not by the *permission* of the plaintiff. In that action plaintiff elected to treat defendant as a trespasser. He is bound by his election, and cannot now treat him as being lawfully in possession, which the action for use and occupation presupposes. (13 Johns. 490; 6 Johns. 48; 11 Pick. 1; 3 Harr. 214; 10 Gill. & J. 49; Taylor's Landlord and Tenant, 294; 2 Nott & McCord, 156; 3 Ser. & R. 500; 11 Maine, 270; 3 Stork, 1511; 14 Mass. 96; 1 Yeates, 578.)

Where there is no opportunity of pleading a judgment on the same point between the parties, (as in this case,) it may be given in evidence, and as evidence it is conclusive. (11 Smith's Leading Cases, 444-5, and particularly the cases, Voight v. Winch, Doe v. Haddoch, Gardenier v. Buckbee, 3 Con. 125, 4 Con. 659; 8 Mead. 1, 22, 24, 35, 43, 44; 2 Hill, 478; 3 Dennis, 338; 4 N. Y. 73; 16 Ser. & R. 282, 285; 17 Ib. 273; 2 Yerg. 467; Combe's Notes to Mil. Ev., 4 vol., 30-35; 2 Wash. 64.)

And as to what is the rule, as regards the same *point* or *question*, which once litigated and settled by a verdict and judgment, is conclusive. (See 4 Con. 73; 3 Con. 125; 26 Maine, 555; 1 Stork, 201; 2 Yerger, 467; Estill v. Saul.)

By the terms "opportunity to plead," as used in the books, is meant *ability* to plead, from the nature and form of the action, which the Court below mistook for the mere time, etc., necessary to prepare the plea.

*As to the admissibility of parol evidence, see 8 [200] Wend. 44-5; 2 Hill, 481; 4 N. Y. 73. The witnesses say nothing as to any other question than that of tenancy in the action for forcible detainer, and do say that this question was litigated. It was for the plaintiff to show if any other question was litigated.

The proceeding in forcible detainer by the plaintiff shows

an election to terminate the relation of landlord and tenant, and to treat defendant as a trespasser: in this action he treats him as lawfully in possession. He cannot come into court and blow both hot and cold. (Archbold's Landlord and Tenant, 150; Taylor's Landlord and Tenant, 294; 1 Wend. 134-6; 1 Term Rep. 378, 386, 387; 2 Nott & McC. 156; 3 Ser. & R. 500; 4 Yerg. 305; 1 Den. 113.)

It is absurd to say, because the Practice Act abolishes the distinctions in the forms of actions, that it is therefore immaterial what the substantial allegations are. As much legal precision is necessary under our system, in setting forth the cause of action, as under any other. A contract sued upon must be sued as a contract, a trespass as a trespass, etc.

There is no privity of contract between the plaintiff and defendant, even supposing that he went into possession as tenant of Loveland, the original lessee of Sampson. (Taylor's Landlord and Tenant, sec. 636, 448; 3 N. Y. 286.)

———, for Respondent.

Under the issue, the record of a former suit was not admissible in evidence in this action. In ejectment, where special pleading is not allowed, in assumpsit upon a general count, where the plea cannot answer the declaration by reason of its generality, and in trover, where not guilty can only be pleaded, a record cannot be given in evidence, and it is submitted in no other case unless pleaded. (8 Wend. 9; 2 Hill, 478; 1 Gr. on Ev. 531.)

If the record was evidence, it could only be conclusive as to the facts appearing on it. (2 Phil. Ev. 19.) If evidence aliunde was admissible to show what was litigated, why could not rebutting evidence be produced? If so, the record and evidence could not be conclusive.

[201] *A mere litigation does not render a record conclusive. It must appear that the same point was *litigated*, *submitted*, and *decided*: collateral matter, or matter incidentally cognizable, or inferred from argument or construction, constitutes no bar. (1 Gr. Ev. sec. 529; 4 Cow. 73; 10 Wend. 80; 3 Wend. 27; 8 Wend. 3; 3 Cow. 125; 4 Cont. Rep. 73.)

The questions litigated in former proceedings and in this

action were not for the same causes of action. The same cause of action is where the same evidence will support both actions in a different form, thus making the evidence given in the first action the test of its identity in the second. (7 J. R. 20; 2 J. R. 21; 8 J. R. 383; 3 Willes, 304.)

The mere bringing an action and no recovery had, does not conclude plaintiff. The election is determined by a verdict and judgment; and a judgment obtained by plaintiff, in a former suit, and subsequently reversed, does not determine his election. (1 Wend. 134; 1 T. R. 378.)

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The action in the Court below was brought to recover \$1400, for the alleged use and occupation of certain premises in Marysville, by the defendant, "*at his request, and by the permission of the plaintiff,*" from March 1, 1851, to May, 1852. The defendant in his answer denies all indebtedness for the alleged use and occupation by him of the premises, and denied that he used and occupied them *by the permission of the plaintiff*.

The legality of the plaintiff's title is not in issue. The plaintiff could not prevail upon it in this action, if it were valid; neither could the defendant dispose of it, if it were not; and whether it belongs to one or the other could not be tried in an action to recover rent for use and occupation. "*Indebitatus assumpsit* for rent, will not lie in favor of a stranger for the purpose of trying his title; or by one of two litigant parties claiming the land: this action depending not upon the validity of the plaintiff's title, but on a contract, express or implied." So it was *expressly said in *Boston v. Binney*, 11 Pick. 1, and *Codman v. Jenkins*, 14 Mass. 96, and the rule is sustained by cases there cited. The plaintiff alleges a contract, express or implied, by the averment that the use and occupation of the lot in question, by the defendant, was "*at the request of the defendant and by the permission of the plaintiff,*" and having thus alleged a contract, he can only succeed by establishing one. The use and occupation of the land claimed by plaintiff creates a presumption of

a contract: the defendant may rebut this presumption by proof that the possession was adverse: this case does not depend, therefore, upon the question, whether the claim of the plaintiff, as heir of John Sampson deceased, was sufficiently established, or whether the decree of the probate court was conclusive, or whether there were other heirs, nor will it turn upon the objection raised of a defect of parties: that objection not having been taken by the answer, it must be deemed to have been waived, and could not be raised upon the trial. (Practice Act, Title IV. sec. 45.)

The correctness of the judgment is involved in the other propositions advanced by the appellant, and the question we now propose to examine is, whether the plaintiff can recover upon mere occupancy without permission of the plaintiff, and against his will?

The record discloses, that the defendant and one Hall took possession of the lot in controversy in Feb., 1850, and that defendant has been in possession ever since; Hall having sold out his interest to him in May, 1851. The plaintiff endeavored to show a tenancy existing on the part of the defendant under John Sampson, who, it is said, became proprietor of the land in 1849, and who died in September, 1850: conflicting testimony was introduced upon this point, but whether the weight of it went to sustain this position or not, it is no part of our present purpose to say, as that was within the province of the jury, and should have been left to them to decide: the fact, however, was controverted by the defendant. The plaintiff claimed to be the rightful heir of the estate of John Sampson, and it appears from the evidence of his own witnesses, that he attempted to oust the defendant from the premises by legal proceedings in May, 1851. It appeared

further, that there had been considerable litigation
[203] *between the parties relative to the possession of the land. At the proper time, during the trial of the cause, the defendant requested to give the jury certain instructions, and among others the following: “*First*, that it is necessary, to enable the plaintiff to recover for the use and occupation of the premises, that he should show that the defendant used and occupied them by the permission of the plaintiff, and that

if the jury believed that the defendant used and occupied the premises against the will of the plaintiff, then they must find a verdict for the defendant." The Court refused so to instruct the jury, and the defendant excepted. In thus refusing, the learned Judge erred.

At common law, no action of assumpsit for rent would lie except upon an *express* promise: the right to maintain such action upon an express or *implied* contract was given by the Statute of 2 Geo. II. c. 19, sec. 14, which has since been adopted as part of the common law; but this statute, from the terms of it, seems only to apply to the case of a *demise*, and where there exists the relation of landlord and tenant, founded on some agreement creating that relation. This rule of the common law, and the construction of the statute of Geo. II. have, in modern times, undergone many important modifications, and the general rule, as at present established, and confirmed by an abundance of authority, we conceive to be as we have already intimated, and, (as more definitely stated in 2 Nott & McCord's South Car. R. *Ryan v. Marsh*, and in *Espinasse's Dig.* 57,) comes to the conclusion, "that no action for use and occupation will lie when possession has been adverse and tortious, for such excludes the idea of a *contract*, which, in all cases of this action, must be express or implied."

This is undoubtedly the correct, as well as the general rule, and is fully supported by the case of *Birch v. Wright*, 1 T. R. 378; *Smith v. Stewart*, 6 John. 46; *Wharton v. Fitzgerald*, 3 Dall.; and innumerable cases cited by these authorities.

The plaintiff does not claim for rent during the lifetime of John Sampson, nor does he rely solely upon the alleged tenancy under him in his lifetime, or the continuance of such tenancy after his death; and if he did, the rule would be none the less applicable, *but the plaintiff seeks to [204] recover for use and occupation merely, and claims the right to do so, even though such use and occupation was without his permission and against his will. Even had the defendant held as tenant under John Sampson in his lifetime, his refusal to recognize the plaintiff as his landlord terminated the tenancy, and overweighed the presumption of a

contract between him and the plaintiff: there was no longer either privity of estate or contract between them, but as was said in the decision of *Balls v. Westwood*, 2 Camp. 11, cited by Justice PUTNAM, in *Boston v. Binney*, 11 Pick. 8, "He renounced the plaintiff's title, divested himself of the possession obtained under the plaintiff, and commenced a fresh holding under his own alleged title." "There was nothing in this conduct which can warrant the inference of holding over at sufferance, even if there had been a prior holding as tenant for a certain time." It was not the mere unexplained holding over of a tenant of which we read in the books. (Coke, Lit. 57.)

"All that the law requires is, that during the time when the tenant actually holds by permission of his landlord, the landlord's title shall not be disputed. But when he ceases to hold in that relation, he may commence upon an adverse title, after the expiration of the lease."

Again, in *Featherstonhaugh v. Bradshaw*, 1 Wend. 134, and in *Bancroft v. Wardwell*, 13 Johns. 489, the doctrine is repeated, that the action can only be maintained when the relation of landlord and tenant *exists between the parties*: it has been held that it would not lie against a person who came in under the plaintiff's title as a purchaser. (2 Johns. Ca. 335; Woodfall, 350.)

But it is said, "that the statutes of California have abolished the distinctions existing at common law," and that technicalities and mere forms are to be disregarded by our Courts; "that substantial rights are regarded, and not the shadows of a case." It is indeed true that distinctions in mere forms of pleading are abolished, but the common error is to mistake substance for form. It is because substantial rights are regarded, that this Court will suffer none to recover

upon a mere "shadow of a case," nor permit a plaintiff [205] on one day to attempt to oust a defendant upon *the ground that he is a trespasser, and on the next to recover for rent upon an implied contract, on the ground that he is occupying with his permission; "for that," to use the language of the Court of King's Bench, in *Birch v. Wright*, "would be blowing both hot and cold at the same time, by

treating the possession of the defendant as that of a trespasser, and that of a lawful tenant during the same period."

The effect of the point raised by the respondent would be to say, that as all technical forms are abolished, the plaintiff can recover in an action brought upon an alleged contract, whether the defendant be a lawful tenant or a trespasser; and if he is not proven to be one, he must necessarily be the other. Such would indeed be the case if he could recover upon mere occupancy; or perhaps the respondent intends to say that the plaintiff may waive tort and maintain *assumpsit*. But the defendant has then a right to say to the plaintiff, "There has been no tort: you having nothing to waive, the land is mine, not yours." And whether it belongs to one or the other, we could not try it in an action for rent for use and occupation, as we have already seen from the cases above cited from 11 Pick. and 14 Mass.

It is a gross error into which many have fallen, to suppose that because the Practice Act abolishes the distinctions in the forms of action, it is immaterial what the substantial allegations of pleadings are, or that all the distinctions which the law makes in the causes of action are swept away. While the mere forms of pleadings are simplified, the body of the law is preserved with all those general principles, those wise distinctions, those strict principles and unerring rules, those sound and logical conclusions, which constitute its justice and justifies its glory as a science.

The plaintiff is not without a remedy. If he has any title to the premises, the defendant is liable to be turned out as a trespasser, and is responsible in that character for the *mesne* profits, or more properly in an action brought under the 64th section of the Practice Act to recover the property, with or without damages, for the withholding thereof, or for waste committed thereon, or for the rents and profits of the same, but not in an action like the present, upon contract, unless he can show that the defendant used and occupied the premises, not adversely and *against his will, but with [206] his permission and as his tenant, and that is a proper question for a jury to pass upon.

We do not deem it necessary to decide the other point

raised by the appellant, viz., "that the Court erred in refusing to allow the defendant to prove the finding of the jury in the forcible entry action in the County Court," further than to intimate that it doth not appear from the record that the defendant had properly prepared the way for the introduction of such proof by parol; nor doth it appear that upon these findings judgment was finally entered.

The judgment of the Court below is reversed, and a new trial ordered.

DULTON, Appellant. v. SHELTON & MARSTON,
Respondents.

ATTACHMENT, REMEDY WHEN TO APPLY.—The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which are made in, or are payable, in this State.

IDEM, WHAT NOT SUBJECT OF.—A debt due for merchandise sold in Boston, to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the act of 29th April, 1851.

IDEM, WHEN PARTY ENTITLED TO.—To entitle a party to attachment under this act, the contract must be made in this State, or must contain a stipulation that the money is to be paid here.

APPEAL from the District Court of the Fourth Judicial District.

This action was brought by the plaintiff, resident in Boston, Massachusetts, to recover of the defendants, residents of San Francisco, \$21,626 08, the value of goods, wares, and merchandise sold by the plaintiff to the defendants.

The complaint was filed March 2d, 1853, and on the same day an affidavit was filed, stating the indebtedness of defendants, and that the contract was made after the passage of the act of April 29, 1851; that the same is payable in this State, and that payment had not been secured by mortgage on real or personal property.

[207] *A writ of attachment issued in pursuance of the above application, and on the 5th March, defendants moved for a rule to show cause why the attachment should

not be set aside. The ground alleged upon the motion was that the contract was not made in this State, nor was the money payable in this State, but that the contract was made, and the money payable in Massachusetts.

The evidence was, that the defendants had purchased on several occasions the merchandise in question from the plaintiff in Boston, and in the course of their business relations had remitted divers sums of money in payment thereof to them in Boston; that no payment had been made to plaintiff in San Francisco, nor demanded by them of defendants, and the letters of the plaintiff to the defendants, accompanying the invoices of goods forwarded, stated as follows: "Funds in payment of the same to be in Boston two and a half months after arrival of vessel." "In future, I should prefer remittances, if convenient, being made direct to me." "Cash to be in Boston two and a half months after arrival of vessel." "In no case omit remitting," etc.

There was also evidence that one of the partners, defendants, resided in Boston for some time during the business relations between them and the plaintiff, and that there was some participation in the profits of certain descriptions of goods, which do not appear to have been considered by the Court.

Upon hearing the case as presented, the District Court, on the 15th March, dissolved the attachment, and the plaintiff appealed.

No briefs on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which are made, or are payable, in this State.

It is argued, that although the contract was not made, nor by its terms payable in this State, yet because the defendants reside here, and the action is transitory, that therefore it is *payable here, and entitled to the attachment. [208] This construction would annul every distinction which is contemplated by the language of the act. All actions or

contracts for the payment of money are transitory, and so the words of the act, "is made or is payable in this State," would have no meaning. The universally admitted rule of construction requires effect to be given, if possible, to every part of a law. We can only follow the rule in this case by denying the right of attachment, except where the contract is made within this State, or if made without it, then accompanied by a stipulation between the parties to it, that the money is to be paid here. A subsequent promise to pay here cannot affect the question in any manner when the suit is brought upon the original contract.

Judgment affirmed.

CHARLES B. YOUNG, Appellant, v. JOEL S. POLACK,
Respondent.

CONTRACT, RIGHT TO CONTRIBUTION ON JOINT CONTRACT.—Plaintiff and defendant took a joint lease for improving certain property. Plaintiff, with consent of defendant, made, in his own name, a contract to make the improvements stipulated by the lease, which he performed, and paid or advanced all the expenses out of his own funds. This contract was drawn by defendant himself. Plaintiff claimed damage of defendant for the failure to advance funds on his part, as the buildings advanced, and the *value* of the buildings erected by him (the plaintiff.) The Court below decreed that the plaintiff recover equal contribution of the money advanced by him, from the defendant, with three per cent. per month interest, the then current rate; which decree was affirmed by the Supreme Court.

APPEAL from the Fourth Judicial District.

The material facts of this case appear to be, that the plaintiff and defendant, in September, 1852, took a joint lease of a lot in San Francisco, stipulating to erect certain buildings thereon, and mutually to provide funds for the purpose, and mutually to pay as the buildings advanced. The ground rent reserved was \$400 per month. The lease was to continue five years, with the privilege of renewal, and it contained [209] a stipulation in the event of *the buildings being destroyed by fire or otherwise, that they should be rebuilt by the lessees, and further provided for a forfeiture and

entry by the lessor, upon a failure in the performance of the conditions by the lessees.

The complaint set out a letter from the defendant to the plaintiff, dated 21st June, 1852, which, referring to the lease, contains the following clause: "As you propose expending a large portion of the amount that will be required for brick buildings on the lot, I would request for its completion that you borrow on loan the addition of funds required, at from two to three per cent. per month, as money is of more value to me." "I expect that you will charge on the amount you may expend three per cent. per month, which I deem entitled to a larger interest, as being the basis by which the required funds may be obtained. Relative to the rents, I propose that you be the receiver, and that no dividend be made to either of us until the entire debt is liquidated, which I am in hopes may be done in twelve or fifteen months, leaving to yourself the option of paying your own outlay first. Until rents are obtainable, I will furnish my quota with the taxes."

It was in evidence that the plaintiff expended on the buildings erected on the lot leased as above nearly all the funds necessary in the progress of the work; also, that he received the rents, and, in his answer, the defendant set up the letter, from which the foregoing extract is taken, as evidence of, and constituting, a contract on the part of the plaintiff to make the advances; and that he made them in consequence of this arrangement. And this was the only evidence tending to prove that the plaintiff was to pay more than the defendant towards the expenses of the improvements on the lot. To this letter there was no written or direct proof that the plaintiff assented or agreed.

It further appears, that on the 6th September, 1852, the plaintiff, with the knowledge of the defendant, entered into a building contract in his own name, for the erection of the buildings; that he erected the same, and constructed a bulk-head to protect them against the water of the bay, and other improvements; for all of which he paid.

That the only money paid by the defendant, on the said lease, *was the ground rent for the month of Oc- [210]
tober, which he had paid without demand, and not-

withstanding a written agreement between plaintiff and defendant, and the lessor, deferring payment till December following.

There was a great deal of fraud charged against each other by the parties, but the evidence offered to sustain the charges was rejected by the Court.

The accounts were referred to the clerk of the court, who reported a balance due to the plaintiff of \$14,920 78, the moiety of the amount advanced by him, for which judgment was entered against defendant, with interest at the rate of three per cent. per month, and the Court decreed defendant to pay the amount in thirty days; and that in default of payment as directed, the injunction heretofore issued (restraining the defendant from asserting any further claim to the property, or interfering in the leasing thereof, etc.) against the defendant, be made perpetual; and upon payment, as decreed, that defendant be entitled to equal ownership, etc., of the premises and rents with the plaintiff. Plaintiff appealed.

W. J. Shaw, for Appellant,

Urged that plaintiff did not advance the money on defendant's credit, but foreseeing from the conduct of the defendant that the whole would fall upon him, took the building contract in his own name, to prevent the defendant from acquiring any right in it, unless he paid his portion of the expenses. That the defendant, knowing the danger and risks of fire and floods, consented to this, and wrote it out with his own hand, thereby abandoning all right to the building, and left the plaintiff to pay all the expenses and take the risks, and become the sole owner of the building if defendant should not pay his proportion of the undertaking. The whole case shows this understanding. If the property had been destroyed by fire, defendant would not have appeared to claim it, or pay for it. The appellant would have sustained the entire loss.

Although the defendant had equal interest in the lease, yet having entirely failed to comply with it on his part, and expressly consented that the plaintiff should alone
[211] erect the *improvements at his own risk and expense,

the parties are not tenants in common in the improvements, but in the lease only.

A co-tenant is not chargeable with the rent accruing on the enhanced value of the property, added by the expenditure of his own funds. (1 McMullin Rep. 75; Ib. 69, 298, 475.)

Defendant should pay half the value of the buildings to entitle him to share in the rents.

If defendant had gone into equity, he could have recovered only on paying half the *value* of the improvements; or if he had claimed the rents, he could only have recovered \$400, the value of the ground without the improvements. (Stor. Eq. Jur., secs. 655, 6 a, 66, and 799; also, 1234 to 1251.)

L. Parsons, for Respondent.

The plaintiff and defendant were tenants in common of the chattel: the improvements of the one were the improvements of the other. One tenant who expends more than his proportion of money can compel contribution. (Kent's Com., vol. iv. 370.)

The plaintiff's action is for contribution, and this he has got, and more, for the law gives him but ten per cent., and he has been decreed three per cent. per month. The claim for damages in addition to interest is denied.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The plaintiff and defendant were joint tenants of an estate for years, and this bill was filed to compel the defendant to contribute for improvements made by plaintiff on the joint property.

The object of the appeal seems to be to deprive the defendant of his interest in the lease. This of course it is impossible to do. The Court below has gone very far in rendering all the relief to which the plaintiff is entitled, and there is certainly nothing in the decree which can be the subject of complaint on his part.

The judgment is affirmed, with costs.

of ownership in the landings; for if found to be in the [214] defendant, he *is certainly entitled to compensation before they can be subjected to the uses of the city. This statement is made in answer to the remarks of counsel as to the apparent conflict in the two decisions of this Court. The fact that Judge Anderson's opinion has been lost, can have no effect upon the decision of the case, nor upon the present appeal.

The present appeal is from an order of the District Court, refusing to set aside an order of the Judge at chambers, staying proceedings upon an execution for costs, issued by the clerk of the District Court, upon a remittitur from this Court filed with him, and from an order of the District Court quashing said execution.

When the plaintiffs filed the remittitur from this court, they applied to the clerk and obtained an execution for their costs. The District Court, in quashing the execution, held that the clerk of the District Court had no power to issue an execution for costs, until by order of that Court; and further, that it was the duty of the clerk of the Supreme Court to issue all executions for costs accruing in this Court. Both of these positions are erroneous. By statute, Pr. Act, sec. 358, the remittitur from this Court is transmitted to the clerk of the Court below. By him it is attached to the judgment roll, and a minute of the judgment of this Court is entered on the docket against the original entry. The judgment of the Court then stands as the judgment of the District Court. If the judgment of this Court orders a new trial, the clerk of the District Court will proceed to place the cause on the calendar: if it awards costs, he will, on application of the party in whose favor it is given, issue execution for the same. In either case, he acts, not by the authority of the District Court, but of this Court. Neither the District Court nor the District Judge have any authority to prevent the immediate execution of the judgment of this Court. So far as the appeal is concerned and the costs consequent thereon, the judgment of this Court is final. It is unnecessary to wait until term time. The rule in force in some States, that judgment cannot be entered and execution issued in vacation, has no existence

in this State. (See Pr. Act, sec. 144-209.) By a rule of this Court, a party who obtains a judgment of *re- [215] versal is entitled, not only to the costs of this Court, but also of the Court below. He files his bill of costs with the clerk: no remittitur issues until ten days after judgment is rendered, and if there are any errors in the bill, the opposite party can within this time have them corrected, by calling the attention of the Court to them. It is difficult to see how, under our statute, where the services for which costs can be charged are so plain, and so clearly designated, an attorney could, without gross negligence, commit any errors in making up his bill. His own affidavit is a sufficient guarantee that the disbursements specified in the bill have been necessarily incurred. We have looked into the bill of costs in this case, and we see no item which is not strictly in conformity with the statute.

The clerk, in entering up the judgment of this Court, adds to the same the words "with costs," and annexes to the remittitur a copy of the bill of costs filed. This he will do in all cases, unless costs are explicitly refused in the opinion of the Court, and these words are a sufficient awarding of costs for the clerk of the Court below to issue execution for the same, on receiving the remittitur from this Court.

The order of the District Court must be reversed, and the order of the District Judge, staying proceedings, set aside, and the plaintiffs can have their execution for the costs of this appeal.

Ordered accordingly

AH THAIE, Respondent, v. QUAN WAN & KAN [216]
SE, Appellants.

INJUNCTION, COUNSEL FEES AS DAMAGES.—In an action upon an injunction bond, to recover damages for the wrongful issuing of the writ, it was held, that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as part of the damages.

¹ **DAMAGES, COUNSEL FEES.**—Generally, the recovery of counsel fees, as part of the damage, is not allowed, as where the loss is *consequential*; but where the loss is *direct*, as in the case of an improper commencement and prosecution of a suit, or other process in a suit, it should be allowed,

APPEAL from the Fourth Judicial District, San Francisco.

The complaint stated that on the 28th May, 1858, one Chin Lan and Ah Lee filed a complaint against the plaintiff, and sued out a writ of injunction against the plaintiff, to which plaintiff yielded due obedience until dissolved; that to obtain the said injunction the defendants executed their bond, in the sum of \$8100, to pay the plaintiff such damages as he should sustain by reason thereof, etc.; that the injunction deprived plaintiff of the use of \$10,000, until the same was dissolved, from which he suffered loss to the amount of \$5000, and paid twenty-five dollars for the safe keeping thereof; and that the plaintiff was obliged to procure counsel learned in the law to procure the dissolution of the said injunction, at the cost of \$1200 and costs, etc., and prays judgment for \$5000 damages, etc.

And the defendants demurred, and assigned for cause among others the charge of \$1200, paid counsel for procuring the dissolution of the injunction, which was the only point considered in this Court. The District Court overruled the demurrer, and the defendants appealed.

Brown and Pratt, for Appellant.

It has been expressly held by this Court that counsel fees cannot be recovered upon an attachment bond, nor any other costs, except such as are taxable. (*Heath et al. v. Lent*, 1 Cal. 410; and see 7 Blackf. 129; 3 Dall. 306.)

[217] *The statute under which the bond was given prescribes its condition to "pay to defendant all damages that he may receive by reason of the wrongful issuing out of the writ of attachment." The statute concerning injunction bonds requires the bond to secure to the party enjoined "such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction," etc.

¹ *Prader v. Grim*, 18 Cal. 588; *Behrens v. McKenzie*, 23 Iowa, 342.

Tingley, for Respondent,

Cited 11 Paige, 244-47, and authorities there cited.

WELLS, Justice, delivered the opinion of the Court.

The appeal in this case is brought upon a judgment overruling the demurrer to the complaint.

The Court below overruled the demurrer, and rendered judgment against defendants, upon the ground that counsel fees necessarily paid to procure a dissolution of the injunction are recoverable in an action brought upon an injunction bond.

It is insisted, that this Court has already decided that counsel fees cannot be recovered in an action like this; and the case of *Heath v. Lent*, 1 Cal. 412, is cited as authority. In that case, the Court, per HASTINGS, C. J., laid down the rule, that in an action on a bond for damages accruing from a wrongful suing out of an *attachment*, counsel fees constitute no part of the damages.

We are referred also to a decision of the Supreme Court of Indiana, *Davis v. Crow*, 7 Blackf. 129, which it is contended, sustains this rule. As to the first, we say, that Chief Justice HASTINGS does not base his decision upon the point raised here; besides, even though it may be said, that it decides the point here, we question the correctness of the judgment of the Court in that case as it stands, and think it erroneous.

The case in *Blackford*, it will be perceived, was brought on a *replevin* bond, and was decided, not according to any general principle of law or equity, but the Court clearly bases its decision, and is controlled in its judgment, by the statutes. And with all due deference we may add, that placing it even upon that ground, upon careful examination of the statutes of the State, neither *does that decision meet [218] with our approval. It certainly cannot control the case before us, or guide us in our judgment.

It is sufficient to say that the cases cited by the appellant were controlled by the statutes and provisions of the particular States; and doubtless the opinions delivered were founded upon them. But, notwithstanding these authorities, we do not entertain the slightest doubt, that an action brought upon

an injunction bond can be maintained in this State, under our statutes, and we concur fully with the decisions of the learned Chancellor WALWORTH, in *Edwards v. Bodine*, 11 Paige, 224, in which he holds, that the taxable costs of the defendants, and the reasonable counsel fees paid by them, upon the application to dissolve the injunction, were a part of the damages sustained by them in consequence of the granting such injunction.

✓ The language of the condition of the bond is undoubtedly broad enough to embrace the necessary counsel fees, which the defendants have been obliged to pay out in order to procure the dissolution of the injunction.

For the *necessity* of paying such counsel fees is an actual damage that the defendant has sustained, in defending himself, and procuring a dissolution of the injunction, and the condition of the bond is imperative that the "obligators shall pay to the parties enjoined such damages as they may sustain by reason of the injunction."

It appears to us that the principle is not only just in equity, but sound in law, that all the damages to which a party may be put by the wrongful issuance of an injunction, should be recoverable in an action upon such a bond, and reasonable counsel fees should be included in those damages; of course, leaving the amount to be assessed by the jury. As this was the only ground of demurrer to the complaint, it is ordered that the judgment of the Court below be affirmed with costs.

HEYDENFELDT, Justice, concurred, as follows:

Generally, the recovery of counsel fees is not allowed as part of the damages, and the reason given for it is because the loss is consequential, and not the actual and direct injury complained of.

[219] *But where, as in this case, the injury complained of is the improper commencement and prosecution of a writ, or of any process in a suit, the counsel fees in such case is a loss as immediate and direct as any other, and should be allowed. Upon this principle, I think the case of *Heath v. Lent*, 1 Cal. 412, is not law.

I concur in the affirmance of the judgment.

CHARLES H. HICKS et al., of the National Mining Company, Respondents, v. V. G. BELL et al., of the Rockville Mining Company, Appellants.

¹ **MINING CLAIM, CONSTRUCTIVE POSSESSION.**—Actual possession of a portion of a mining claim, according to the custom of miners, in a given locality on the Yuba River, extends by construction to the limits of the claim, held in accordance with such customs.

DISTRICT COURT, CONSTITUTIONAL JURISDICTION.—The jurisdiction of the District Court is confirmed and defined by the constitution, and no statute can deprive it of its powers.

IDEM, IN CASES RESPECTING MINING CLAIMS.—Although the jurisdiction of mining claims is given to Justices of the Peace, that of the District Court remains unaffected, if the amount in controversy exceeds \$200.

² **UNITED STATES AS PROPRIETOR OF PUBLIC LANDS.**—The United States, as owner of land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from State taxation.

³ **STATE SOVEREIGNTY OVER MINERAL LANDS.**—The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors.

⁴ **IDEM, MINER'S LICENSE.**—The State, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and to affix such terms and conditions as she may deem proper to the freedom of their use.

APPEAL from the Tenth Judicial District, for Yuba County.

The complainants, styling themselves members of the National Mining Company, state that, on the 27th of July, 1852, and for two years previous, they were owners of a certain mining claim, situated in the bed of Yuba River, beginning at the mouth of Deer Creek and extending two hundred yards down said river, including the bed of the same, and that said claim was held by the said plaintiffs "according to the rules and customs of miners *in the im- [220] mediate vicinity of said river mining claim," and was worked by them during the mining season of 1851, and also the mining season of 1852, so far as the said season has continued, up to the period of the commencement of this suit.

¹ Approved, as to miner's right of entry on the public lands, *Irwin v. Phillips*, 5 Cal. 145.

² Cited, *Stokes v. Barrett*, 5 Cal. 39; *Merced M. Co. v. Fremont*, 7 Cal. 324; *Boggs v. Merced M. Co.*, 14 Cal. 305, 373, 376. Overruled, *Moore v. Swan*, 17 Cal. 217; *Doran v. O. P. B.R. Co.* 24 Cal. 257.

³ Cited, *Conger v. Weaver*, 6 Cal. 557

That the defendants, as well as H. Hitchcock, — Martin, and others unknown, members of the Rockville Company, did, on the 27th of July, take possession of and work upon about ninety feet of the upper portion of the said claim; and do now, contrary to the rights of your complainants, after being fully advised of the same, work upon the said claim to the extent of said ninety feet; and complainants say that said ninety feet is worth \$5000. That defendants well knew that plaintiffs were the first and lawful owners of said claim, and although repeatedly notified to leave the same, and though possession thereof was demanded by plaintiffs, defendants had refused to surrender the same. The plaintiffs therefore pray for damages, etc., and to be placed in possession of the premises, and for further relief, etc.

The answer of the defendants denies the whole of the allegations of the complaint, and aver that, excepting Davis, Hicknor, and others, named by plaintiff, according to the rules, regulations, laws, and customs, in force upon the said Yuba River in the immediate vicinity of said mining grounds, the said Rockville Mining Company, to wit, the said defendants, (except as above,) are the rightful owners of the said ninety feet of mining ground in dispute, and are in the rightful possession of the same.

A jury was sworn in the case, and the plaintiffs called J. Hebbard, who proved that, in the spring of 1852, the witness "had seen a notice atuck upon the ground claimed, and now in dispute, from the plaintiffs; which afterwards did not appear on the ground, and was lost." Thereupon the plaintiffs presented a paper, purporting to be a copy of the original notice of which witness had testified, and offered to read it to the jury, the object being to establish the plaintiffs' right, under the mining rules and regulations, to the premises in controversy. Defendants objected to the paper, but the Court overruled the objection, and defendants excepted. The paper however, it appears, was not read to the jury.

The plaintiffs then offered to prove that a certain portion of said mining claim in controversy had been worked.

[221] The *defendants objected to the offer, on the ground that the proof should only apply to the particular part

of the claim now in dispute. The Court overruled the objection, and remarked that it judicially knew that such was the general custom throughout the country in relation to the working of the mines, and had been so repeatedly ruled by the courts of the State. To which judgment and ruling defendants excepted.

The plaintiffs then asked a witness if he knew of any arrangement or understanding between the plaintiffs' company and any other compsnny, by which they were to join ditches, so as to enable the plaintiffs to work the upper part of their claim. Defendants objected, but the Court permitted the question to be asked, and defendants excepted. After the plaintiffs had proved that there were written laws and regulations which governed the mines, and which were observed at that point on the Yuba River where the claim in dispute is located, and after they had proved that a written instrument containing these laws and regulations had been in the hands of one J. B. Mulford, as the original, and was partly lost, which instrument the said Mulford had once heard proven as the original in a legal investigation and by competent witnesses, the plaintiffs offered to read to the jury, as the laws and customs governing the mines and miners where the claim in dispute is located, a copy of said instrument or written laws and regulations so proven to be lost, the said copy agreeing when compared with that portion of said written laws that was proven and preserved as aforesaid; to which offer defendants objected, and the Court admitted it. Defendants excepted. The copy, however, was not read.

The statement then proceeds to say that the proofs on the part of the plaintiffs, when fully heard and closed, showed and established that the premises in dispute, as set out in the complaint, were a part of the Yuba River, below water mark, and of which neither the plaintiffs nor the defendants had ever been in actual possession, except that the plaintiffs had been in possession of the bed of the river below the line of the premises in dispute, and claimed that the premises in dispute being a part of the original claim, that therefore they were in possession of the whole, under the rules and customs of miners; and that the waters then *overflow- [222]

ing had not at any time been either disturbed, molested, or changed by defendants; and that the premises in controversy are lands, the fee of which is in the United States of America, and the premises have never been let to the plaintiffs.

On these grounds, and on the further ground that the District Court has no original jurisdiction, defendants moved for judgment of nonsuit against the plaintiffs, which the Court overruled.

The jury found for the plaintiffs; and the Court ordered judgment for plaintiffs that they have and recover from the defendants the possession of the premises in the plaintiffs' complaint mentioned, and that they have a writ of restitution therefor with costs, etc.

Defendants appealed.

[The reporter has given the foregoing statement of the evidence and proceedings in the case without much abridgement, and pretty much in the language of the record.]

Dunn and Field, for Appellants.

The Court erred in refusing the nonsuit on the ground that it had no jurisdiction. By statute, actions concerning mining claims can only be brought in a Justice's Court. (Pr. Act, sec. 621-23.)

The premises belong to the United States, and the United States never having sanctioned any entry upon them, all provisions of law in relation thereto must be regarded as police regulations, and be strictly pursued—(*United States v. Gear*, 3 How. U. S. Rep.)—and therefore the District Court can take no jurisdiction by virtue of its general powers.

The proof showed that defendants never had been in possession of the premises in dispute, and had never molested the plaintiffs, and the allegation of possession was therefore unfounded, the contrary being shown by the evidence. The same sentences in the answer which allege ownership and possession in defendants allege that the same was *rightfully* in them. The plaintiffs cannot use these allegations to give jurisdiction and reject them on the merits of the case.

The proof showed that the plaintiffs had never been in actual possession; and whatever rights exist with regard to it can only *be of a possessory character, for it is [223] admitted that the claim is on land of the United States. Possession is only *prima facie* evidence of title, and as this is rebutted in this case, plaintiff's claim must be limited to his *actual* possession. But he claims constructive possession by the rules and customs of miners. Of these rules there was no proof, and the only proof given to the jury was what the Court undertook to give judicially. These rules are varied with every locality, and no Judge can know them judicially.

The claim of plaintiffs was taken up in 1850, and yet the ground in dispute had never been touched or occupied since. To permit the holding of a claim so long a period unworked and unoccupied is against the whole policy of the law.

C. W. Bryan, for Respondent.

It is not required that the proof of the extent of the claim shall be confined to the identical land worked: no custom can be made to apply to such a rule. Possession of a portion of land, where it is defined by limits, is possession of the whole, subject to the controlling custom of the mines, and the proof must be left to the jury. (*Smith v. Young*, 2 Barb. 545; 6 Pet. 598.)

Presumptions from evidence of the existence of particular facts are in many cases, *if not in all*, mixed questions of law and fact. (*Bank U. S. v. Corcoran*, 2 Pet. 133.)

The proof of an agreement with a party foreign to the record, regarding the ditch, was admissible to show the faith of the parties in their continued occupation. (1 Gr. Ev. 67, 68; 2 Pet. 133.)

The original of the mining laws was proved to be lost: a copy was therefore evidence. (9 Wheat. 483; 2 Barb. 545.) This copy was *examined*.

If the general Government does own the fee in the lands, yet the State has power to regulate the police of the mines within its limits, in like manner as they may prescribe the mode of acquiring possession of farming lands. The State has taxed the property of the mines, and has derived revenue

from it. Is not this right of taxation, and that of property, inseparable?

[224] *The proof is, that the plaintiffs were in possession by defined limits, and when about to join ditches with another, so as to bring the whole claim into working condition, that defendants entered upon it.

The District Court has jurisdiction in all civil cases in law and in equity, where the amount exceeds \$200. This is a civil action, and the value in dispute above the amount necessary to confer jurisdiction. The act extending the jurisdiction of Justices of the Peace does not limit or exclude that of the District Court, which is a Court of general powers.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The objection that the record discloses that there was no actual possession is not good, because it appears there was actual possession of a portion adjacent to the premises in dispute, and, as I understand it, constructive possession of the latter was claimed by the rules and customs of miners on that part of the river. Nor can it be determined that the jury were not properly informed as to what were these rules. The bill of exceptions does not pretend to set out all that occurred on the trial, but only such incidents as were subjects of dispute and exception.

The jurisdiction of the District Court is conferred and defined by the Constitution, and no statute can deprive it of its powers. Although the jurisdiction of mining claims is given to the Justices of the Peace, that of the District Court remains unaffected, if the amount in controversy exceeds two hundred dollars.

The main reliance in this case of the appellants is, that the land in question is the public land of the United States, and therefore the statutes of this State, which recognize the possessions of miners, which provide for their protection, and require mining claims to be decided according to the rules and regulations of bodies of miners, at each particular mining locality, are mere police regulations, and are invalid to confer

any right, such as that of possession, or to enable the recovery thereof.

This position involves the decision of the question, to whom do the mines of gold and silver belong? To arrive at a satisfactory *solution, it is only necessary to examine [225] a few of the leading authorities.

According to the common law of England, mines of silver and gold are termed royal mines, and are the exclusive property of the Crown.

Blackstone says, vol. i., p. 294: "A twelfth branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials, and therefore those mines which are properly royal, and to which the king is entitled, when found, are only those of silver and gold. By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some, the whole was a royal mine, and belonged to the king." And he cites 2 Just. 577.

In the case of *The Queen and the Earl of Northumberland*, cited from *Plowden*, it was decided that although the king grant lands and the mines which are in them, yet royal mines will not pass by so general a description.

It was further explicitly decided, in the same case, that all mines of gold and silver within the realm, though in the lands of subjects, belong to the Crown; and this right is accompanied with full liberty to dig, and carry away the ores, and with all such incidents thereto, as are necessary to be used for getting them.

This case has never been overruled, and stands as the accepted exposition of the common law. For although Lord *HARDWICKE*, in the case of *Syddal v. Weston*, 2 Atk. 20, seems to confine the royal right of entry to cases where the mine had already been opened, yet he does not question the royal ownership, and seems finally to decide the case upon a different reason. Even, however, his slight departure from the doctrine of the case in *Plowden*, was subsequently disapproved and doubted as authority by Sir *WM. GRANT*, Master of the Rolls, in the case of *Seaman v. Vawdrey*, 16 Ves. 393.

The rule, therefore, as laid down in the case from *Plowden*,

may be considered as uncontradicted, and has the solemn sanction of being the concurrent decision of all twelve of the Judges.

Blackstone, it will be seen, attributes the origin of [226] the law to *the right of coinage. Plowden says, that the reason is because gold and silver are most excellent things, and the law has appointed them to the person who is most excellent, and that was the king. It is, however, immaterial as to the reason for its origin: the law has been settled beyond question, as it is declared by the earliest and most distinguished Judges, and to this time has never been disputed. (See Bainbridge on the Law of Mines and Minerals, where the authorities are collected.)

This doctrine of the law has been acted upon in some, and probably in many, of the States in the Union. In Pennsylvania, it was the subject of legislation as early as 1787. In that year, by an act establishing a land office, she reserves for the use of the Commonwealth, one-fifth of all gold and silver ore. (See Dunlap's Laws of Pennsylvania.)

In New York, as early as 1789, an act of the Legislature was passed, exempting the discoverers of gold and silver mines from paying to the people of the State as sovereign thereof, any portion or dividend of the yield, for the space of twenty-one years from the time of giving notice of the discovery; and forbidding the working of the same after the expiration of that term. (See 1 Laws of New York, 124.)

Again, in 1827, another act was passed, which declares that all mines of gold and silver discovered, or hereafter to be discovered, within this State, shall be the property of the people of this State, in their right of sovereignty. (See 1 Revised Statutes, 281.)

This was in effect but a re-enactment of the common law, which vested the right in the State government as the successor of the king.

It is hardly necessary at this period of our history to make an argument to prove that the several States of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the king at common law.

An analogous question to the one under consideration was

fully discussed in the Supreme Court of the United States in the case of *Pollard's Lessee v. Hagan*, 3 Howard. It was there held, in the case of a new State, that she was admitted into the Union upon the same footing as the original States, and *possessed the right of eminent domain. [227] Numerous other cases can be cited in which the decisions are uniform that the United States has no municipal sovereignty within the limits of the States.

In reference to the ownership of the public lands, the United States only occupied the position of any private proprietor, with the exception of an express exemption from State taxation. The mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, solely the right to authorize them to be worked; to pass laws for their regulation; to license miners; and to affix such terms and conditions as she may deem proper, to the freedom of their use. In her legislation upon this subject, she has established the policy of permitting all who desire it to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity.

According to this enactment, the case under consideration has been tried and decided, and for aught that is disclosed by the record, the decision is consonant with right and justice.

Judgment is affirmed.

[228] *A. D. THAYER, Appellant, v. THOMAS J. WHITE,
Respondent.

¹ PLEADING, INSUFFICIENT DEFENCE IN ACTION ON ACCOUNT.—In a suit for the recovery of the purchase-money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant in his answer denied that the plaintiff was the lawful owner, or that he had any title to the land. *Held*, that to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that failing in this, his defence to the action was defective

APPEAL from the Sixth Judicial District.

This action was brought for the recovery of \$3000, founded upon an agreement, under the seals of the parties, by which the plaintiff bound himself to execute to defendant "a warranty deed," for a lot of ground in Sacramento, described in the said instrument, in consideration of \$6500, of which \$3000 was to be paid in hand, and the balance as set forth in the agreement. The complaint was, that the plaintiff, in pursuance of said agreement, on the 24th November, 1852, executed "a warranty deed," for the premises, and tendered the same to the defendant, which defendant refused to accept; and plaintiff filed said deed as executed, and tendered the same with this complaint; and that upon the tender of the deed as aforesaid, the said sum of \$3000 became due and payable from defendant, to him; yet had defendant refused to pay, etc.

The answer of the defendant denies the allegations of the complaint generally, and specially sets out, that the plaintiff did not duly perform the conditions of the said agreement on his part, and denies that he was bound to receive a deed so executed and tendered as alleged by the plaintiff. That on the 24th day of November, 1852, when the said deed was alleged to have been tendered, the said plaintiff was not the lawful owner of the said premises, described in the said agreement, that plaintiff had not the right to convey the same, and by the said deed, did not convey the same to, or vest in, the

¹ Cited, *Arguello v. Edinger*, 10 Cal. 160; *Weber v. Marshall*, 19 Cal. 457. Approved, *Reddell v. Blake*, 4 Cal. 267; *Wright v. Carillo*, 22 Cal. 598.

said defendant, a good and sufficient title to the said premises. The defendant also demurred to the plaintiff's bill, which was overruled; and on the 17th March, the case was submitted to a jury, who found for the *plaintiff, \$3000, [229] with interest, etc. Judgment was entered accordingly; and defendant appealed.

De Witt, for Appellant.

Robinson and Morrison, for Respondent.

The point decided by the Supreme Court does not appear to have been discussed in the arguments of counsel.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Of the various assignments of error, there is but one which cannot be deemed frivolous.

The answer sets up that the plaintiff was not the lawful owner of, and has no title to, the land conveyed.

To this objection the plaintiff urges that his contract was only to execute and deliver a warrantee deed, and to require more, would be to impose on him an obligation which he had not assumed.

The object of the party in bargaining for a warrantee deed to the land is to obtain a good title, and if this object cannot be attained, the contract is at an end.

The question to be determined is, whether such a defence is good in an action of this kind, and whether the defence as set up is good in this action.

In countries where the equity and common law jurisdictions are separate systems, it is well settled that such a defence at common law is not admissible, and the usual practice is for defendant to file his bill in chancery, where, by proper allegations, he may enjoin the suit at law, and obtain a rescission of the contract. In this State we have a mixed system. The jurisdiction of the law and equity are blended together, and it is a clear design in our statute that circuitry of action shall be avoided, and that the right of each party, whether legal or equitable, in respect to one subject-matter,

shall be determined in one action, whatever may be the form in which it is begun.

This departure, however, from the mode of practice which prevails in most common law States must not be understood to affect or alter, in any degree, the settled principles [230] of decision *at common law or in equity. On the contrary, the facts of each case, as disclosed by the complaint and answer, must determine its character as belonging to the one system or the other, and it must be tried and decided accordingly. The defence attempted to be set up in this case, belonging as it does to the jurisdiction of Chancery, the case at once becomes a case in equity, and must be determined by the principles of that system. Treating it accordingly, the defendant's averments are insufficient to enable him to avail himself of the doctrine of rescission. To do so, it has always been held necessary to aver, and to show, a paramount title in another. This has not been done in the present case, but the defence is made to rest upon the naked allegation that the plaintiff has no title.

Such loose pleading is not allowable, because it fails to put the other party upon notice of what he has to meet, and according to the well-established doctrine that all pleading must be taken most strongly against the pleader, the averment must be treated as irrelevant, if not frivolous.

Judgment affirmed.

[231] *BACKUS, DAVIS & CO., Appellants, v. ALLEN MINOR, Respondent.

INTEREST, COMPUTATION OF.—Upon a money demand bearing interest, on which payments have been made after maturity, the proper method of computing interest is stated by Chancellor Kent, in *Connecticut v. Jackson*, 1 Johns. Ch. Rep. 18.

IDEM, ACCOUNT STATED.—But where an account has been stated by the plaintiff, charging interest both on the debt and the payments, and rendered to the defendant, and no objection made thereto within a reasonable time, it is the same as an agreement that the interest should be computed accordingly.

IDEM, MODE OF COMPUTATION WHEN BINDING.—When the dealings of the parties extended through a period of more than two years, during which time several accounts were rendered by plaintiffs to defendant, and the same mode of computing interest was pursued throughout, this mode was held to be binding upon them.

APPEAL from the Fourth Judicial District.

The facts in this case, as they appear upon the record, show, that in September, 1850, respondent made and delivered to the appellants, three promissory notes, two of them dated September 11th, 1850, for \$5000 each, and the other dated September 12th, 1850, for \$5913 40, and all bearing interest at the rate of *six per cent. per month*. Sundry sums were paid on the notes, at different times, after their maturity; the last payment, November 15th 1851. In December 1851, appellants brought suit for the recovery of the balance, alleged by them to be due by respondent, on the notes, and the question was referred to referees, for determination, who decided there was nothing due thereon at the time of suit brought.

This finding was based upon the method of calculating interest upon the claims, which was by computing interest on both debt and payments up to the date of the last payment, November 15th, 1851, at the above rate, six per cent. per month.

The notes were secured by a mortgage of personal property, placed by the respondent in the hands of the appellants, to be sold by them, and the proceeds to be applied in payment of the notes. The appellants, on several occasions before the date of the last payment, had rendered accounts current to the respondent, in which the interest was computed on both debt and payments; the method pursued by the referees, who were of opinion that *appellants were. [232] bound by this method, having themselves adopted it, and were estopped from insisting upon any other.

Judgment was entered on the report, and a motion for a new trial being overruled, this appeal was taken; the only question in which is, whether there was error in the mode adopted in computing the interest, as above explained.

McAllister, Edwards, and Rose,

Insisted that the only true mode of calculating interest, is

by computing it on the debt due to the day of the first payment, then appropriating such payment to the extinguishment of the interest, and the balance, if any, towards the principal, and so on. (3 Cow. 86; 1 Johns. Ch. Rep. 17; Ib. 209.)

If the interest be computed in this way, there was due to appellants, November 15th, 1851, about \$1861 50. Whereas, by the mode adopted by the referees, there was nothing due on that day; and the result is produced by the difference in the modes of computation.

If the appellant, in rendering his accounts, computed the interest under a false impression of his rights, he is not therefore estopped from asserting them when the error is discovered. If this doctrine would apply in a case where an innocent third party might be affected by it, such is not the case in the present question. The transaction has been confined entirely to the parties to the notes. Besides this, the accounts were rendered with the customary reservation that all errors were excepted. Neither does it appear that six per cent. per month interest was allowed.

Hambly, for Respondent.

The calculation was made by the referees, according to the custom of merchants, that is, by charging interest *all the time* upon the principal, and allowing like interest on the payments. A different rule works injustice to the debtor; and the counsel referred to the various modes adopted in different States. (Tracy and Wickoff, 1 Dallas, Wash. C. C. 169; 1 Johns. Ch. 13; 2 Johns. Ch. 209.)

The accounts of appellants were rendered in this form, and this was held to be binding on the parties. (See 2 Wash. C. C. 167; also, 4 Scam. 4; 7 Greenl. 48.) The counsel [233] also *submitted a paper exhibiting the results of the different modes of calculation.

The statute does not *require* an express agreement, but says what shall be allowed, where there is no express agreement. The respect paid by Courts to common usage, may be seen in *Koons v. Millar*, 3 Watts & S. 271, and 7 Wend. 315.

The opinion of the Court was delivered by HEYDENFELDT, Justice—WELLS, Justice, concurring.

Upon a money demand bearing interest, on which have been made payments after maturity, the proper method of computing the interest is stated by Chancellor Kent, in *Connecticut v. Jackson*, 1 John. Ch. 13. "The rule for casting interest," he says, "when partial payments have been made, is to apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments, taken together, exceed the interest due."

It seems, however, from the evidence, that a different mode of computing interest is common among merchants. They calculate the interest, at the rate agreed upon, both on the debt and the payments, and in this way a slight difference is made in favor of the debtor. In this case, that was the plan of calculation resorted to, and the appellants rendered to the respondent an account stated, to which it does not appear that any objection was made by the respondent. The effect of the account stated thus without objection within a reasonable time is the same as an agreement that interest should be computed accordingly, and connected with the fact that this is a common method of computation, is sufficient to prevent any disturbance of the judgment.

Affirmed, with costs.

On motion of the appellants, the Court ordered a re-hearing of the above case, which was again argued.

**Crittenden, Inge, and Marin, for Appellants.*

[234]

The doctrine of estoppel does not apply. If the appellants had claimed more in the accounts rendered than the respondent admitted to be due, failure to object on his part for a length of time might be construed into an admission of their

correctness, for such acquiescence would be contrary to his interests. Still it would not be conclusive, for he could prove fraud or mistake, and he would not be estopped from doing so. But in the case in question, the appellants claimed less than was due: their error was to the advantage of respondent, and the reason growing out of the presumption from the silence of the party altogether fails, for his silence is not contrary to, but in accordance with, his interests.

The "Act to regulate the interest for money," 1850, p. 92, fixes ten per cent. per annum when there is no "express contract in writing fixing a different rate," but the respondent, by express contract, has agreed to pay six per cent. per month, and this the law permits and the Courts will enforce.

The respondent has been allowed more than ten per cent. by the referees on his *payments*. This can only be claimed upon the ground of the express contract provided by the statute. And if the contract is available to him, it must be so also for the appellants; and a different rule applied to the latter would be unjust, and a violation of the statute. The only *express* contract as regards interest is comprised in the notes given by the respondent to appellants, and there is no reason for departing from the established rule in computing the interest due upon them.

Hambly, in reply,

Insisted that the accounts rendered by the appellants were justly considered by the referees as binding upon them, and that the acquiescence of the respondent showed the understanding of the parties in relation to the question, that appellants were estopped to deny the facts stated in their account, etc.

The following opinion was, at the close of the argument, delivered by HEYDENFELDT, Justice—WELLS, Justice, concurring.

The re-argument of this cause has not induced me to change my opinion.

[235] *The dealings of the parties run through a period of more than two years. During this time, the appellants render to the defendant three or four stated accounts,

showing balances. In all of these accounts, and throughout the whole of this time, they pursue the one mode of calculating interest: it has become their way of doing business. It is their system, and they pursue it and persist in it until the indebtedness of the defendant is fully paid off, as found by the award of the referees.

It is true that an account after payment may be opened and surcharged on the ground of mistake, but the calculation of interest by the plaintiffs in this case can in no sense be called a mistake. It was a deliberate, methodical plan of doing business, according to a well-comprehended rule, and there is no authority or reason, at law or in equity, by which they are entitled to any relief.

Judgment affirmed.

MCNALLY, Respondent, v. MOTT, Appellant.

¹ **AMENDMENT OF JUDGMENT, WHEN ERRONEOUS.**—The defendant was sued and served by the name of *George Mott*, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the Court to amend the judgment, by altering the name of *George* to *Gordon*. *Held*, that this was error.

APPEAL from the Tenth Judicial District.

The whole case is stated in the opinion of the Court.

Field, for Appellant,

Cited *Prac. Act*, secs. 68, 69, 70, 71, and 523; *Howell's Practice*, 368; 9 *Barbour*, 202.

HEYDENFELDT, Justice, delivered the opinion of the Court.
WELLS, Justice, concurred.

The defendant was sued and served by the name of *George N. Mott*, and making no appearance, judgment was entered

¹ Cited, *Smith v. Ourtis*, 7 Cal. 587; *Ford v. Doyle*, 37 Cal. 348. See *Sutter v. Cox*, 6 Cal. 415; *Wilkins v. Stidger*, 22 Cal. 235.

against him by the same name. Afterwards, and with-
[236] out notice *to the defendant, the plaintiff, on his own
motion, obtains an order from the Court to amend the
judgment by altering the name of George to Gordon, in which
state the judgment now stands.

It is very evident that the amendment is not sustained by
the previous proceedings. The action is against one person
and the judgment against another. We have no power to
determine, on the application of the plaintiff alone, that
George and Gordon are one and the same person. There is
no legal proof of that fact in the record, and *prima facie*, two
different names must be held to signify two different persons.

The judgment is reversed, and the cause remanded.

HANSON et al., Respondents, v. WEBB, Appellant.

¹ **FERRY RIGHTS, ALLEGATIONS IN ACTIONS FOR VIOLATION OF.**—In an action brought
to recover damages by the owners of a licensed ferry against a party alleged to
have run a ferry within the limits prohibited by law, it was held that the com-
plaint should have alleged that defendant ran his ferry for a fee or reward, or the
promise or expectation of it, or that he ran it for other than his own personal use
or that of his family, and that the omission of these allegations was fatal.

APPEAL from the Tenth Judicial District, Sutter County.

The complaint in this case stated that the plaintiffs were
the owners of two ferries, regularly licensed, one by Sutter
County Court of Sessions, and the other by Yuba County
Court of Sessions, plying across Feather River, and that de-
fendant ran a ferry from January to July, within a mile of
plaintiffs' ferries, and that without license had from any court,
etc., to the damage of plaintiffs, \$5000.

The defendant demurred to the complaint. The case (the
demurrer having been overruled) was left to a jury, who
found for plaintiff \$600, for which judgment was entered,
and from which defendant appealed.

¹ Cited, Cal. State Tel. Co. v. Alta Tel. Co. 22 Cal. 423. See Norris v. F. & T. Co.,
6 Cal. 594; Chard v. Stone, 7 Cal. 117.

Hastings, Thomas, and Morse, for Appellant.

The 18th section of the Act of 18th March, 1851, giving a remedy to the owners of licensed ferries, subjects those only to *the prescribed penalties who "shall, for [237] fee or reward, or the expectation or promise thereof, set any person over any river or creek whereon public ferries are established," etc., and the Act of 29th April, 1851, sec. 1, exempts from the operation of the former act those who keep a ferry for their own personal use or that of their family.

The exempting clauses should have been negated in terms, or the complaint should have averred that defendant "ran a ferry, etc., for fee or reward, or the expectation thereof," or for other purposes than for his own or his family's use. (Chit. on Plead. 233, and cases cited Bac. Abr. Statute L.)

Walker, for Appellant.

If the omission in the complaint was a defect, it was cured by the verdict: the Court below would not have suffered the question of damages to go to the jury, unless it appeared by the evidence that defendant was not protected by the 1st section of the act. But it was not necessary for plaintiffs to show affirmatively that defendant did not come within the exception of the amended act. After denying defendant's license, it was for him to show a license, or that he ran his ferry for his own or his family's use.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The declaration in this case is too defective to sustain the judgment. It should have alleged that the defendant ran his ferry for fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use, or that of his family. Such are the only events in which the statute does not give to the owner of a licensed ferry protection against the infringement of his franchise.

The general demurrer to the declaration was properly taken, and ought to have been sustained by the District Court.

The judgment is reversed, and the case remanded.

[238] *MIDDLETON, Respondent, v. FRANKLIN,
Appellant.

¹ INJUNCTION IN CASES OF NUISANCE.—To entitle a party to an injunction in a case of nuisance, the injury to be restrained must be such as cannot be adequately compensated by damages; or it must be irremediable or lead to irremediable mischief.

² NUISANCE, WHAT CONSTITUTES.—The erection of a steam-engine and machinery, and a grist-mill, in the cellar under an auction store, held not to be such an injury as to require the restraining power of the Court; at least, not until the question of nuisance or not, should be determined by a jury.

IDEM, REMEDY.—Even then the remedy at common law is ample.

APPEAL from the Superior Court of the City of San Francisco.

This was an application, on the part of the plaintiff, to restrain defendant from the erection of an alleged nuisance. The facts were, that the plaintiff occupied the upper part of a building as an auction store; the defendant occupied the cellar below, and both held as tenants under the City Market Company. The complaint proceeds to set forth, that "the defendant is now in the act of erecting in the said cellar, a steam-engine, furnace, and boiler, to drive a mill and machinery for grinding flour, which he is also erecting in said cellar, and is about to pierce the wall of said cellar and erect a flue for that purpose, there being no smoke-flue from said cellar, thereby creating a most grievous nuisance to the plaintiff, by reason that the said boiler is a dangerous and hazardous article, and liable to explosion, rendering it unsafe for the plaintiff, his customers, etc., to occupy or frequent the said upper part of said building, and to store goods therein, etc., and unsafe by the increased probability to take fire from the said furnace; and interfering with the quiet occupancy of the said building, by reason of the noise of the machinery, etc., to the diminution of their value, etc., and prays for an injunction to restrain defendant from erecting the same," etc.

The Court directed an injunction restraining defendant, etc., until the further order of the Court.

¹ Cited, *Eastman v. Company*, 47 N. H. 78.

² Cited, *People v. Davidson*, 30 Cal. 334. See *Gunter v. Geary*, 1 Cal. 466; *Bequena v. Los Angeles*, 45 Cal. 55.

The answer of the defendant admits that he is erecting a mill and machinery, etc., but denies that the furnace of the *steam-engine is to be placed in the building, [239] but in an open space without the building, so as not to endanger the plaintiff's property, or interfere with his enjoyment thereof, and denies the nuisance, etc., and specially denies that he intends piercing the wall and erecting a flue, etc., or that he intends to use his building contrary to law; that the injunction has injured him to the amount of \$1000, and he prays that it be dismissed, and for damages, etc.

The Court, after hearing the case, ordered the injunction to be modified so as to permit the defendant to make the erections complained of, but that he continue to be restrained and enjoined from using, working, or driving the same, until the further order of the Court, and further, that the undertaking of plaintiff upon the injunction, etc., be increased to \$5000. Defendant appealed.

G. T. and W. H. Sharp, for Appellant.

In an action for an alleged *private* nuisance, a party cannot be enjoined before a jury has found the act complained of to be a nuisance. By the 249th sec. of the Code, it is expressly provided that a nuisance can be enjoined by judgment only.

The section authorizing an injunction, *pendente lite*, where irreparable injury is being done, does not apply to the action for a nuisance.

It is not every case that will sustain an action for a nuisance, that will authorize an injunction. (*Corporation of New York v. Mapes*, 6 Johns. 46; 6 Paige, 83; *Attorney-General v. Nichols*, 16 Ves.; 10 Ala., N. S., 63.) The injury must be of a nature not susceptible of compensation in damages, or such as from its continuance will lead to irreparable injury. Diminution of value to property will not justify an injunction. (2 Sto. Eq. Jur. sec. 925. See Code, sec. 249; and see, specially, Chief Justice MURBAY's opinion in *DeWitt v. Hays*, in this court, Oct. T.; 10 Ala. 63.)

A steam-boiler is not, *per se*, such a nuisance that it should be abated or arrested by injunction. As to the *noise* as a ground, see *Taylor's Landlord and Tenant*, p. 106. There is

no instance of an injunction in the case of an eventual [240] or contingent *nuisance. The risk of fire is common to all residents of cities. This Court will review the exercise of discretion in an inferior court. (See 1 Law Rep. 110; 1 Bland, 355; 6 Paige, 295; 1 Cal. 609.)

To sustain this injunction, the evidence must be speculative, mere opinion, as to the probable effect of the erections.

Dwinelle, for Respondent.

The granting or continuing an injunction *until the hearing* is matter of discretion, and will not be interfered with by this Court, especially if the answer be unsatisfactory, evasive, or improbable. (2 Johns. Ch. 204; Der. Eq. 429; 1 Barb. Ch. Pr. 640, and cases cited; 3 Danl. Ch. Pr. 291, etc., Harrisburg ed.)

The answer does not deny that the *boiler* and machinery is to be erected within the building: it denies only that the furnace is to be so erected; and the boiler may be within, while the furnace is without. The answer in this is evasive.

The explosion of a boiler is not owing to the pressure of steam, but to its decomposition into its component gases, and the explosive character of hydrogen, which the strength of no boiler can resist. Would a powder-magazine be a nuisance in an auction store? If so, so would be a steam-engine. (Bouvier's Law Dic., Nuisance.) A man for gain may risk a nuisance in his own case, but has no right to impose this risk on another. A nuisance is that which produces annoyance, whether by injury or damage. (See also Pr. Act of 1851, sec. 249.) A blacksmith shop may not be, *per se*, a nuisance in a country village, but would be in Montgomery Street, etc. Ringing bells on Sunday has been held a nuisance (*First Baptist Church v. Schenectady R. R. Co.*, 5 Barb. 79); so a coal-yard (8 Paige, 351); a manufactory of steam-engine boilers, if the noise annoys a neighbor. (*Fisk v. Dodge*, 4 Denio, 311.) The answer that a steam-engine will not be dangerous, and that the grist-mill will not make any noise, is absurd.

The Practice Act does not require a judgment as the basis of an injunction, but allows the writ to issue "*upon the facts*

of the complaint." The cases in which Chancery has required the previous verdict of a jury are those in which the plaintiff's right to the *locus in quo* was denied.

HEYDENFELDT, Justice, delivered the opinion of the Court.

*It is well settled that to entitle a party to an in- [241] junction in a case of nuisance, the injury to be sustained must be such as cannot be adequately compensated by damages, or it must be irremediable, or lead to irremediable mischief.

Such is not the case presented by the allegations of the complainant's bill. It does not show a sufficient probability of mischief to require the restraining power of the Court, or at least until the question of nuisance or not is determined by a jury, and even then the remedy at common law is ample.

Let the injunction be dissolved, with costs.

WILSON, Respondent, v. CUNNINGHAM and POTTER, Appellants.

NEGLIGENCE, LIABILITY FOR.—Defendants were owners of a private railroad, constructed by them, and run with machinery under a license from the City Councils, through certain streets of San Francisco. The plaintiff claimed damages for injuries done to himself, his horse, and wagon, in a collision with the railroad cars, charging the defendants with negligence. *Held*, that where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care.

APPEAL from the Fourth Judicial District.

The plaintiff complained that the defendants were engaged in running cars by machinery along Battery Street in the city of San Francisco, and across Bush Street in the same city, upon a railroad, and for their own purposes, and that plaintiff was passing along said Bush Street and across Battery Street with a horse and wagon and divers goods, etc., when the de-

defendants, with their said cars carelessly and negligently came into collision with the said plaintiff and his wagon, etc., at the intersection of Bush with Battery Street aforesaid, with such force and violence that the horse of plaintiff was killed, and his wagon and goods broken and wholly destroyed and lost, and the said plaintiff severely bruised and injured in his body and limbs, to his damage \$10,000, and prays judgment, etc.

[242] *The defendants demurred to the complaint, for insufficiency of cause of action, and severally answered, denying all negligence, carelessness, etc., and averred that plaintiff was driving furiously and carelessly along Bush Street, and ran his wagon, etc., against the cars, without any neglect, etc., on the part of those in charge of the cars, and that the collision was occasioned by the plaintiff's own carelessness, etc., and denies the injury to plaintiff to the amount alleged, or any injury.

The cause was tried by a jury, who found for plaintiff damages \$959 50, and the Court ordered judgment accordingly.

Several witnesses were examined by the respective parties, but in view of the only point considered by the Supreme Court, it is not necessary to state the testimony. When the evidence was closed, the Court below charged the jury:

"That the defendants had a right to run their cars on the track in question under the state of the pleadings; that the plaintiff, in order to recover, must prove, not only that the injury was not caused by his own negligence, but that it was caused by the negligence of the defendants; that the question of negligence was a question of fact for the jury; that the degree of care required of the defendants was in proportion to the danger incident to the business they were engaged in; that the running of cars on the highway being an extraordinary way of using the public streets, and attended with extraordinary danger to passengers, the defendants were bound to use the utmost care in order to prevent injury to passengers; and it was for the jury to determine from the evidence whether the defendants had used all proper care, etc., in view of the extraordinary nature of the business, and the extraordinary danger incident to it."

Defendants excepted to the charge.

The Court was also requested to instruct the jury on several points put by the respective counsel, which, so far as they have any bearing upon the opinion delivered by this Court, will be found noted in the arguments of the counsel.

The verdict and judgment were rendered as above, and a new trial having been moved by defendants, and refused, they took this appeal.

No question was raised by the pleadings as to the *right* of the *defendants to run the cars in ques- [243] tion; and it was admitted by the plaintiff that, previous to the injury complained of, the defendants obtained the right to lay the railroad track and run the cars, by license from the City Council.

Halleck, Peachy, and Billings, for Appellants.

The Court erred in charging the jury that defendants were bound to use the *utmost* care. (*Bond v. T. & S. R.R.* 8 Barb. 379, 380; 21 Wend. 615.)

The Court erred in refusing to charge the jury, "That if they were satisfied that defendants were running their cars in the usual manner, and with ordinary care, as they had the right to do by the permission given to them by the Common Council, they cannot be made liable in this action." (See the above case, 8 Barb. 379, 380.)

The Court erred in refusing to charge, "That if it was *doubtful* whether the injury was occasioned by the negligence of the plaintiff, he cannot recover." (*Logford v. Large*, 24 E. C. L. 394.)

Lockwood, for Respondent,

Referred to the charge and views of the District Court.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

In the case of railroads which are permanently established by law as a mode of conveyance, the rule is correctly stated by the respondent's counsel, that the conductors are only required to use the ordinary care pertaining to that description

of business. But no reason exists for extending such a rule to the present case. Where the streets of a city, forming, as usual, thronged thoroughfares, are diverted from their ordinary and legitimate uses, by special license, to a private person, for his own benefit, and for the pursuit of a business which involves constant risk and danger, no other rule is consistent with the safety and protection of the community, than that which demands extraordinary care.

Judgment affirmed

[244] *COCHRAN & VAN WINKLE, Appellants, v.
JAMES H. GOODMAN, Respondent.

PLEADING, CONSTRUCTION OF.—A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., “then and there acting as the agents of defendant,” is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer.

IDEM, COMPLAINT IN HÆC VERBA.—Where the complaint, in *hæc verba*, set forth the bill of sale, it was held to remedy a defect in the description of the quantity of the goods sold, a party must be presumed to know what was intended by his own account.

APPEAL from the Superior Court of the City of San Francisco.

The complaint set forth that on the 28th December, 1851, plaintiffs had bought a quantity of malt from the firm of Whitcomb & Peck, then and there acting as agents of defendant, and paid the said agents therefor, as will appear by their bill of sale in the following words and figures, to wit:

Messrs. Cochran,

Bought of Whitcomb & Peck.

30,000 malt, @ 8 cts.....	\$2400 00
Brokerage	60 00

\$2460 00

By cash	200 00
---------------	--------

\$2260 00

1851, Dec. 28th.

Rec'd payment,

WHITCOMB & PECK.

That a part of the malt, to wit, 3540 pounds, was not delivered; that on the 24th February, the same was demanded by plaintiffs of said defendant, and his said agent, who refused to deliver the same, to their damage, \$500.

Defendant demurred, for cause: 1st. That said complaint does not show that the plaintiffs bought the malt therein mentioned from the defendant, or any privity of contract between the plaintiffs and defendant. 2d. That it does not show how much malt was bought as therein stated. 3d. Nor at what price said malt was bought. 4th. Nor any [245] agreement for the purchase and sale thereof. 5th. Nor where it was to be delivered.

The demurrer was sustained by the Court, and respondent appealed.

No brief is on file for appellants.

Wilson and Conner, for Respondent.

The complaint does not show a contract with the appellants. It should have averred that Whitcomb & Peck were the agents of defendant. They might assume to act without authority of defendant: the clause, "acting as agents," is mere *descriptio personæ* of W. & P. The bill of sale does not show a contract with defendant. The phrase, "a quantity of malt," is too indefinite; so is "30,000 malt," which may mean bushels, pounds, grains, sacks, or anything else. The complaint only shows a sale by Whitcomb & Peck. The word "sold," implies delivery, but the complaint avers that a part was not delivered; it, therefore, contradicts itself. (See *Hilliard on Sales*, title Bargain and Sale.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The plaintiffs allege the purchase of "a quantity of malt from Peck & Whitcomb, then and there acting as the agents for defendant." This is only another form of declaring that they had purchased from the defendant. It is sufficiently certain to prevent any misapprehension of its meaning; and is, therefore, no good cause of demurrer.

The description of a "quantity of malt," is certainly a

loose and indefinite detail of the contract; but it is aided by setting out, "*in hæc verba*," the bill of the article purchased, as rendered by the defendant. It is true that that is not definite as to quantity; but, as the object of every allegation in a declaration, is to inform the defendant with what he is charged, it seems to me, that nothing can effect this better than the mode adopted, as it is a necessary presumption that he must know what was intended by his own account.

There is, I think, no good ground of demurrer; and the order sustaining it must be reversed, with costs.

[246] *BURT, Appellant, v. WASHINGTON, Respondent.

MECHANIC'S LIEN, WHAT SUBJECT TO.—The statute of 1850, providing for the lien of mechanics and others, limits the structures on which parties can obtain such lien, to buildings and wharves. Under this act, no such lien could be had on bridges.

APPEAL from the Ninth Judicial District.

The opinion of the Court contains a statement of the facts in the case.

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

Murray and others contracted to construct a bridge in Battle County. They employed Wedry and others to get out timber in the mountains, for the construction of the bridge; and paid them a portion of their wages in advance. For the balance, Wedry and others sued and recovered judgment. They had previously filed a notice, in the Recorder's office of Battle County, of their intention to hold a mechanic's lien upon the timber they had cut. Before a recovery of the judgment, the plaintiff purchased and took possession of the timber. The defendant, who is a constable, levied the execution issued on the judgment upon this timber; and the present action was brought to recover its possession from him. The only question for this Court is, whether Wedry and others

could hold a mechanic's lien for their wages on the timber cut by them.

It is clear they could not. The statute of 1850, providing for the lien of mechanics and others, limits the structures on which parties can have a lien, to buildings and wharves. By a recent act, a lien may be held on bridges; but at the time of the purchase by the plaintiff, no such lien could be held.

The judgment must be reversed, and the cause remanded. Ordered accordingly.

***ADAMS & CO., Appellants, v. W. H. TOWN, [247]
Respondent.**

SUMMONS, INSUFFICIENT RETURN OF.—A summons issued from a Justice of the Peace, at the suit of respondent against appellants, designated in no other way than by the name of "Adams & Co.," which was returned served by "leaving a copy thereof with Captain Charles B. Macy." No one appeared for defendants on the return day, and the Justice gave judgment against the defendants for \$369. There was nothing on the record to connect Macy with the defendants. Defendants appealed to the County Court of Yuba County, who affirmed the judgment. *Held*, that the judgment was bad.

JURISDICTION OF SUPREME COURT ON APPEAL.—By the Constitution, this Court has appellate jurisdiction in all cases where the matter in dispute exceeds \$200; and this Court and each of its Justices are expressly authorized to issue all *writs* necessary and proper to the exercise of its appellate jurisdiction; and by the 7th section of the Judiciary Act, have authority to issue all *writs necessary and proper* to the complete exercise of the powers conferred by the Constitution; and under these provisions, this Court has power to issue a writ of error to the County Court, when no express provision by law exists by which such case can be brought into this Court, without process issuing from it.

WRIT of Error to the County Court of Yuba County.

The facts of the case and the arguments of the counsel are stated in the opinion of the Court.

Field, for Appellants.

Bernard, for Respondent.

WELLS, Justice, delivered the opinion of the Court. **HEYDENFELDT**, Justice, concurred.

This action was commenced in a Justice's Court of Yuba

County. In the summons and proceedings, the defendants are in no other way designated than by the name of "Adams & Co." Whether this is a sufficient designation of the defendants under our statute, it is unnecessary to decide. The constable who served the summons returned the same with his certificate, that he had served it, "by leaving a copy thereof with Captain Charles B. Macy, the 17th day of January, 1853." On the return day of the summons, no one appearing for the defendants, the Justice proceeded to take evidence as to "*the damages*" sustained by the plaintiff, and gave [248] judgment against the defendants *for \$369, including the costs. On appeal to the County Court of Yuba County, the judgment was affirmed. The case comes to this Court from the County Court on a writ of error.

In examining the record, we can find nothing to connect Charles B. Macy with Adams & Co., who are named as defendants. He is not mentioned in any of the proceedings of the action, as being a partner, or as having any connection with them. Nor does the certificate of the office connect him in any manner with that firm. The Justice could, with as much propriety, have entered judgment on a certificate of service upon any other person. The respondent objects that this Court cannot issue a writ of error to bring up a judgment of the County Court for review. By the Constitution, this Court has appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, and this Court, and each of its justices, are expressly authorized to issue all writs and process *necessary* to the exercise of its appellate jurisdiction. (Const., Art. VII., sec. 4.) By the 7th section of the Judiciary Act of 1851, this Court, and each of its justices, are authorized to issue all *writs necessary or proper* to the complete exercise of the powers conferred by the Constitution. A similar provision is retained in the Judiciary Act of 1853. It would seem that the power is ample enough, if the writ be either *necessary or proper*.

In the Practice Act, no provision is made for any appeal from the County Court to the District Court, from a judgment rendered on appeal, except in cases involving the legality of a tax, fees, toll, impost, license, municipal or other

fine, or the possession of real property; nor is there any provision for an appeal directly from the County Court to this Court. This omission has been corrected by an Amendatory Act passed in May last; but at the time the judgment in the County Court was rendered, and the writ of error in the present case was issued, there was no provision of law by which this case could have reached this Court, except by some process issuing from this Court. It was therefore a proper and necessary writ. Section 333 of the Practice Act applies only to the recovering of a judgment by appeal. The same act in other titles *speaks of the reviewing [249] of judgments in other ways—as by the writ of certiorari. (See sections 408, 456.) No legislation can impair the appellate jurisdiction of this Court fixed by the Constitution, and this Court will in all cases named in the Constitution exercise it.

The judgment of the County Court must be reversed, with costs; and that Court directed to set aside the judgment before the Justice.

Ordered accordingly.

J. H. EDDY, and others, Appellants, v. JOHN SIMPSON,
and others, Respondents.

WATER RIGHTS.—The foundation of a right to water is the first possession; and this right is usufructuary, and consists not so much in the fluid itself as in its use. The owner of land over which it flows has the right to its use during its passage. This right is not in the *corpus* of the water, and only continues with its possession.

¹ **IDEM, RIGHT WHEN LOST.**—When the water of a stream leaves the possession of a party, all his right to and interest in it is gone.

IDEM, RIGHT TO INCREASE.—If the water of stream A be diverted from its natural channel by C and used by him, and then flows from his works into stream B by natural channels, it is lost to the first possessor, and he cannot reclaim it on the ground that the water of stream B was increased by his means.

¹ Approved, *Kelly v. Natoma W. Co.* 6 Cal. 108; *N. C. & S. C. Co. v. Kidd*, 37 Cal. 310. Commented on, *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 151. Cited, *McDonald v. Aakew*, 29 Cal. 206. Distinguished, *Hoffman v. Stone*, 7 Cal. 49.

IDEM.—If the water of stream B be in the possession of another party, D, the addition made to it, flowing from the works of C, becomes a part of the body of water, and D has the right to its possession and use, and C has no right to withdraw it.

APPEAL from the Tenth Judicial District.

This action was brought to recover damages for interfering with the water right of the plaintiffs. The plaintiffs had prior occupancy of the waters of Shady Creek, by means of a dam and a ditch constructed by them, and used the same for mining purposes. The defendants, by like means, obtained the use, for like purposes, of other neighboring streams, and after using the water thereof, it flowed by natural [250] channels into Shady Creek above *plaintiffs' dam.

Defendants then built a dam above plaintiffs' dam on Shady Creek, and withdrew a portion thereof from plaintiffs' works, so as to leave them deficient in supply, and at times without water, for their purposes. The defence was based upon the fact, that defendants having by their works added to the quantity of water in Shady Creek, that they had a right to withdraw a like quantity for their own use; and this was the question at issue. The facts will be found very clearly stated in the opinion of the Court.

The District Court charged the jury as follows:

“As a general principle, the party who first uses the water of a stream, is by virtue of priority of occupation entitled to hold the same. If a company or association of miners construct a ditch, to convey water from a running stream for mining or other purposes, and they are the first to use the water, locate and construct the ditch, they are legally entitled to the same as their property, to the extent of the capacity of the ditch to hold and convey water. For, if it appears that there is more water running in the stream than the ditch of the first party can hold and convey, then any other party may rightfully take and use the surplus, and it does not matter whether the excess of water be taken from a point above or below the dam of the first party.

“In the case before the Court, the plaintiffs are clearly entitled to as much water as they originally had in Shady Creek,

but no more, and if the defendants, by constructing a ditch and dam at a point farther up the stream, convey water therefrom, so as to diminish the quantity first used by the plaintiffs, then they are liable to them for damages. If the defendants, by means of their ditch from 'Grizzly Cañon' and 'Bloody Run' conveyed into Shady Creek as much water as they afterwards took from it, by their second ditch, then plaintiffs cannot be damaged.

"The doctrine of confusion or mixing of property does not apply. If defendants' ditch had conveyed the water into the ditch of the plaintiffs, then no doubt plaintiffs could have claimed the whole; but it emptied into Shady Creek a considerable distance above the plaintiffs' dam; and the point at which the second ditch takes off the water is still above the plaintiffs' dam, and in the natural channel of Shady Creek."

*——, for Appellants,

[251]

Cited 2 Blackstone, 18; Angell on Water Courses, 86, 89, 116. If water runs out of my pond into another, I cannot reclaim it. The right is usufructuary, and is lost with loss of possession.

Rowe and Dunn, for Respondents.

A mere prior occupation gives no exclusive right to the water above or below, especially where not claimed by a riparian proprietor. (*Platt v. Johnson*, 15 Johns. 213; 17 Johns. 306; 4 Mason, 397.) A prescriptive right to prior occupancy requires fifteen years to sustain it.

Riparian owners and all others must return the water to its natural channel before they can claim a prescriptive right.

Water can be diverted if the quantity required is not diminished. (3 Pick. 269; 8 Mass. 136.)

WELLS, Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

From the record in this case, it appears that the plaintiffs constructed a dam across a stream called Shady Creek to French Corral, where the water was used by plaintiffs for mining purposes.

After the construction of plaintiffs' work, and plaintiffs had been for a considerable time in possession of and using the waters of Shady Creek, the defendants constructed a work of a similar nature, whereby they brought water from Grizzly Cañon and Bloody Run, to a place known as Cherokee Corral, where the water from defendants' ditch was used for mining purposes. The water thus used by defendants at Cherokee Corral, from that point found its way by natural channels and by the natural level of the country, into the waters of Shady Creek, above the dam of plaintiffs.

The defendants subsequently constructed a dam above the plaintiffs' dam, run a ditch to French Corral, and diverted a portion of the waters of Shady Creek, so that at times no water descended to plaintiffs' works, the entire quantity being used by defendants' ditch above.

The point made by the defence, on the trial of the cause below, was, that by the act of the defendants the waters [252] of Grizzly *Cañon and Bloody Run, were caused to flow into Shady Creek; that therefore the defendants had a right to construct a dam and ditch above plaintiffs, and carry off the same quantity of water from Shady Creek, that flowed from defendants' ditch at Cherokee Corral.

This defence is set up substantially in the answer of defendants, and the Court below held, that defendants had an exclusive right to the water which they had caused to flow into Shady Creek, and could withdraw the same. The instruction refused and the charge given by the Court, both assume this right in the defendants.

In considering the question presented, it is to be observed, that the foundation of the plaintiffs' right was their first possession. Of all the waters running into Shady Creek, they were in the possession and use until defendants constructed their ditch above them, running to French Corral. There is no pretence of right in the defendants to carry off water from Shady Creek, except a claim of property in the water from Cherokee Corral.

It is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.

The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession. (Angell on Water Courses, p. 86.) A party cannot reclaim water that he has lost. (2 Black. Com. p. 18.) When the water of Grizzly Cañon and Bloody Run left the possession of the defendants at Cherokee Corral, all right to, and interest in, that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady Creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.

As defendants had lost all right in the water, they could have no right to withdraw it from the possession of the plaintiffs. The rule laid down by the Court below, while it is a departure from all the rules governing this discription of property, would *be impracticable in its application, [253] and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this State are embarked.

The judgment of the Court below will be reversed, and the cause remanded for a new trial.

OGDEN, Appellant, v. MILLS, Respondent.

ATTACHMENT, WHEN GARNISHEE SHOULD BE DISCHARGED.—Where a garnishee, in discharge of a rule, answers on oath, that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the Court without further delay, unless his answer is controverted by the affidavit of the plaintiff.

IDEM, WHAT OPERATES AS DISCHARGE OF.—And where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared, to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer.

APPEAL from the Sixth Judicial District.

On the 18th September, 1850, D. Ogden Mills was garnisheed, in the case of Frederick Ogden v. Matthew Keith, as a debtor of said Keith, by the plaintiff. He appeared at the proper term, and was informed by the attorney of the plaintiff, Ogden, that they did not wish to examine him then. He was subsequently informed by Ogden that he did not intend to examine him, and who absolved him from all liabilities connected with the notice served upon him as garnishee. On the 1st of October following, Ogden, the plaintiff, took judgment against Keith, and about the 3d December, 1852, one Presly Dunham took an assignment from Ogden of said judgment against Keith, and on the same day, more than two years after the service of the garnishee upon Mills, said Dunham filed a notice in the District Court, and moved that Mills should show cause why an attachment should not issue against him for failing to answer as garnishee as aforesaid, on the 18th September, 1850, on the notice above stated.

On the 4th December, 1852, Mills appeared in Court and filed his affidavit setting forth the above facts, and re-
[254] sisted the *application of Dunham, but the Court, after hearing the parties, ordered him to appear before L. Saunders, Jr., as referee, and answer on the original garnishee, to which order Mills excepted.

Mills afterwards appeared before Saunders, the referee, and denied that he owed said Keith anything at the time of the service of the garnishee, or at any future time, and denied all responsibility in the premises.

Dunham then appeared before the Court, and moved that an issue be formed between himself and Mills, garnishee, which the Court overruled, and Dunham excepted.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Where a garnishee, in discharge of a rule, answers, under oath, that he was released by the plaintiff from his obligation to answer, and that the plaintiff had abandoned his examination, he should be discharged by the Court without further

delay, unless his answer is controverted by the affidavit of the plaintiff.

And while a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. This rule results from the peculiar relationship of the garnishee to the action. He at first partakes more of the character of a witness than a party; and as well might a witness be expected forever to appear because of one summons for a certain day. The business relations of men, who thus become incidentally connected with the litigation of others, cannot be allowed to be indefinitely suspended on account of the gross laches of those others.

Judgment affirmed.



OCTOBER TERM, 1853.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

OCTOBER TERM, 1853.

MORRISON, Administrator of RAMEREZ, Deceased, Appellant, v. DAPMAN & WEST, Respondents.

¹ **JUDGMENT, POWER OF COURT TO AMEND.**—A Court may, at any time, render, or amend, a judgment, *nunc pro tunc*, where the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court.

IDEM, WHEN NOT AMENDABLE.—But if there is record evidence to show that the judgment was different from the one entered, the latter must stand until reversed.

² **IDEM, POWER WHEN LOST.**—Nor will a Court be permitted, after the lapse of a term, to open a judgment upon motion, and render a new judgment.

APPEAL from the Superior Court of San Francisco.

This was an ejectment for the 50 vara lot, No. 453, in San Francisco, and for \$5000 damages for mesne profits. The deceased claimed to be seised of said lot, November 13th, 1843, and died so seised in January, 1844: the plaintiff is his administrator, and there is no other property of said deceased except his claim to this lot. The complaint set forth demand and refusal of possession, and the defendants' answer denies all the allegations of the bill, and claims title in defendants under the city of San Francisco.

¹ Cited, *Branger v. Chevalier*, 9 Cal. 173; *Branger v. Chevalier*, Id. 351; *De Castro v. Richardson*, 25 Cal. 53; *Mayo v. Sacramento*, Cal. Sup. Ct. Oct. T. 1870 (not reported.)

² Cited, *De Castro v. Richardson*, 25 Cal. 52; *Casement v. Ringgold*, 23 Cal. 338; *Fairchild v. Dean*, 15 Wis. 210.

The cause was placed on the calendar in March Term, 1852, and was continued, at the instance of plaintiff's counsel, in order to procure testimony, (the defendants being ready for trial,) until July Term, 1853: when the cause being called, and the plaintiff not ready, the cause was dismissed, on motion of plaintiff's *attorney, and judgment to that effect, and that "the defendants do recover their costs," was ordered to be entered by the Court.

No allusion was made by either counsel as to the costs, nor was any instruction given by the Court, but the clerk, after judgment was entered against the administrator, without the knowledge of defendant's counsel, added as follows: "And it is further ordered, etc., that said judgment be levied, and made of the effects of the said deceased in the hands of the said administrator unadministered." July 19, 1853.

Execution issued against the plaintiff, and a portion of the property of the plaintiff was sold, and the judgment satisfied.

Previous to the sale, plaintiff's counsel moved to set aside the said execution, and it was postponed for argument; after which the Court refused the motion, and the sale took place, after due notice.

Subsequent to the sale, the plaintiff moved to set it aside, and vacate the certificate of sale given by the sheriff to the purchaser, and all proceedings; which was granted, and the Court ordered the same to be set aside for irregularity.

Defendants' attorney then moved to amend the original judgment in the cause, by striking out that portion of it which directed the same "to be satisfied out of the estate of Ramirez, deceased, in the hands of the said administrator, (the plaintiff,) unadministered;" which motion was granted, and the Court ordered that "the said judgment be revived, and stand entered against the said plaintiff and in favor of said defendants, for the said sum of \$263 30, with costs, etc., and that the same be amended by striking from the same the final clause, that directs the said judgment to be levied of the effects of the said Pascal Ramirez, deceased, in the hands of his administrator unadministered; and that the said judgment, after striking out the said final clause, do stand as the judgment of the Court. February, 1853."

Plaintiff appealed.

———, for Respondent,

Cited 3 How. 16; 2 U. S. Dig. 656; 4 N. H. 115; 19 Johns. 244; 18 Johns. 502; 14 Johns. 219; 5 Taunt. 553; 1 Com. Law Rep. 284; 12 Mod. 245.

No brief on file for appellant.

HEYDENFELDT, Justice, delivered the opinion of the Court.

*In July, 1852, the Superior Court entered judgment that the defendants recover their costs, to be levied *de bonis intestatis*.

In January, 1853, this judgment is opened and amended, so that the costs be levied *de bonis propriis*.

A court may at any time render or amend a judgment *nunc pro tunc*. But this power is confined to cases where the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court.

If there is no record evidence to show that the judgment was different from the one entered, the latter must stand as the judgment until reversed.

And although a court may thus at any time make the entry conform to what was the judgment rendered, it will *not* be permitted, after the lapse of a term, to open upon motion and render a new judgment. Such a practice is too loose, and would give rise to too much uncertainty.

Judgment reversed.

KENYON, Respondent, v. GOODALL & CO., Appellants.

MEASURE OF DAMAGES ON CONTRACT FOR SERVICES.—The loss of time, value of services, and wages of employees, caused by the failure of a party to perform his contract, are not remote, but strictly proximate and immediate damages, and ought to be allowed.

APPEAL from the Sixth Judicial District, Sacramento County.

This action was founded upon a contract, made the 27th

March, 1852, between the plaintiff and defendants, in which the plaintiff contracted to sell and deliver a steam-engine to defendants, and to make another to match, with force-pump, etc., (describing the machinery;) all to be done and put into full operation in the quickest time possible, by the plaintiff; the defendants to pay therefor \$3200, in the manner and at the times set forth. And it was agreed that the engine then made should be delivered by the 5th April, 1852, the whole work to be completed within twenty days from the date of the contract; and that the plaintiff should pay, as the liquidated damages, \$20 for every day's delay. The complaint then avers performance in all particulars, except that the said articles were not all completed and delivered to defendants within the stipulated time; but were all delivered on or before the 6th May, 1852, when the defendants executed to plaintiff a receipt for the same, acknowledging the full settlement of all matters of damage growing out of the delay in the premises, by which defendants waived all right to complain for the said failure, etc. The complaint then avers that defendants have failed to comply on their part with the contract, in making payment according to its stipulations, and claiming \$1200, with interest ten per cent. per month, from the 6th May aforesaid.

The answer of defendants admits the execution of the contract set forth in the complaint, but denies that the property was delivered according to the contract, and specially denies that on the 6th of May, 1852, they executed a receipt to plaintiff, acknowledging the delivery, etc., and the full settlement of all matters of damage growing out of the delay, etc., by which defendants waived all right of complaint for the said failure, and avers that if such receipt was given, it was obtained by fraud, and is false in fact, and not the act of defendants. And denies all the allegations of plaintiff, which charges failure on the part of the defendants to comply with their contract; but admits that they have not paid the sum of \$1200, because of the failure of the plaintiff to perform on his part, and that, by reason of his said failure, the defendants had sustained direct damage to the amount of \$1525, and consequential damage to the amount of \$2000, because of the

delay in getting their mill in operation, occasioned by the said failure, in the expense of hands, engineers, etc., in their salaries, until the delivery of said engine, and loss of profits during the time, and by the establishment of a rival mill proximate to defendants', which would not have been erected there but because of said delay, etc., in all amounting to \$3525, and they claim as a set-off, after deducting the \$1200, the balance, to wit, \$2325, for which they ask judgment, etc.

By consent of the parties, the case was referred to a referee, who found, That the plaintiff made and delivered the machinery, (with some exceptions, stated in the report, not material to the *point decided in this Court,) [259] which defendants received, and waived all claim for damage, by reason of delay; that one of the boilers was defective, for which defendants suffered damage to the amount of \$400, and reports that plaintiff is entitled to judgment against defendants for \$1511 10, and interest till paid, at the rate of ten per cent. per month.

The report then proceeds as follows: "In the above finding, the loss of time, services and wages of employees at defendant's mill, and the profits which defendants might have realized from the working of their mill, during the time occupied in repairing the defendants' boiler, and supplying the machinery which was wanting, are not estimated, because it was not deemed legally proper to consider them in the estimate of defendants' damages."

Judgment was entered by the Court for the sum awarded, from which defendants appealed.

Sanders and Edmonds, for Appellants.

The argument was very much confined to the facts of the case, and in the examination of the testimony, which was not considered in the opinion of the Court, as to the point decided. It was contended that in cases assimilated to this, there are no fixed rules in the estimate of damages: profits are not always denied, but sometimes allowed. The loss of the use of defendants' mill, and other machinery, the fuel consumed, the delay and wages of workmen, the interest of the capital expended, etc., should be allowed. (See *Sedgwick*

on the Measure of Damages, 29, 30, 71, and 72, who refers to 3 Barb. S. C. Rep. 424. See also the Brooklyn Case, Ib. 73 to 75, and pages 85, 86, 59.)

Robinson and Morrison, for Respondent.

Where property sold is defective, the measure of damages is the difference in value between it, as it is in fact and as it ought to have been. (3 Barb. 424; Sedg. on Damages, 287, 289, 290; 2 Greenl. Ev. 266, sec. 262.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The referee erred in his estimate of the damages. The loss of time, value of services, and wages of employees, caused by the failure of the respondents to perform their contract, are damages *by no means remote, but on the contrary strictly proximate and immediate. They ought to have been considered and allowed.

The judgment is reversed, and the cause remanded.

WILCOMBE, Respondent, v. DODGE et al., Appellants.

¹ NEGOTIABLE INSTRUMENT, ACTION PREMATURE.—The payee has all of the last day on which his note falls due, in which to pay it, and a suit commenced for its recovery on that day is premature.

APPEAL from the Fifth Judicial District.

This suit was brought to recover the amount of a promissory note made by defendants to plaintiff—dated March 15, 1852, for \$3034—payable *fifteen days from date*.

The execution of the note was admitted. Defendants proved by the clerk of the District Court, that the complaint was filed on the 2d day of April, that the summons, attach-

¹ Explained, *McFarland v. Pico*, 8 Cal. 634. Cited, *Davis v. Eppinger*, 18 Cal. 381. See *Bell v. Sackett*, 33 Cal. 410.

ment, copy of summons, and copy of complaint, were issued on the same day to the sheriff of the county; and the papers so issued were produced, endorsed, "Filed 2d April, 1852."

The defendants here rested their case and moved for judgment, on the ground that plaintiff could not recover in this action, he having commenced his suit before the expiration of the *grace days* allowed by law. Which the Court overruled, and defendants excepted.

The Court ordered judgment for the amount of the note and interest, on the 11th November, 1852, with costs, from which defendants appealed.

Huntington, Martin, and Dwinelle, for Appellants.

In the absence of statutory authority, a note importing on its face to be payable within a limited time, after a certain event, *i. e.*, after sight, or on a particular day, or at sight, is not really payable till three days afterwards, unless, etc. (Smith's Mercantile Law, Halcomb & Gholson's ed., 301, 302, 248, 260, and note; 3 Kent Com. 6 ed., 100, 101.) Notes stand on the same *footing with interest bills. [261] (Stats. of Cal. 1850, 247, 248, sec. 1 and 4.)

An action on such note will not lie until the last day of grace, nor on that day without demand of payment and refusal. (See 4 Tem. Rep. 170; *Wiggle v. Thompson*, 11 S. & M. 452; 3 Wend. 170; 3 Pick. 414; 2 Ib. 125; 9 Ib. 420.)

The note in question was dated 15th March, 1852, and was payable, including three days' grace, on the 2d April, that being the last day, and the defendant had the whole of that day to pay it; but on that day plaintiff commenced his suit, and the District Court erred in sustaining it.

An action is commenced by filing the complaint. (Pr. Act, 1851, sec. 22.)

Irving and Benham, for Respondent,

Admitted that defendants were entitled to the days of grace, but insisted that although the complaint was filed, and summons issued on the last day, yet the writ was not *served* until the day after; and a suit is not commenced until the service of the writ. (10 V. 479; 6 T. R. 617; 6 Taunt. 141.)

The words relied on by appellants, in the Pr. Act of 1851, sec. 22, are merely directory as to the order of proceeding: "Civil actions shall be commenced by the filing of the complaint and issuing of the summons." This direction reversed the common law proceeding, in which the writ issued in the first place.

A defendant is only called upon to answer after the service of the writ: the filing of the complaint is nothing to him, whether early or late, and the time within which he must answer runs from the service of the writ, not from the time it was issued.

Where demand is necessary before suit brought, the service of the writ is a good demand; and this involves the corollary that the service is the commencement of the suit. (Chit. on Bills, 9 Am. ed. 360.)

Where a judgment was taken by default, defendant moved to set it aside, upon his affidavit that the debt was not due when suit was commenced, though due when the affidavit was filed. The motion was refused. (2 Johns. Ca. 224-5; 1 Johns. Ca. 393.)

[262] *The defendants admit the debt to be due at the time of filing their answer.

But the weight of authority is in favor of allowing suit to be brought after demand and refusal, *on the third day of grace*. The case 4 T. R. 176 was overruled 3 Campb. 193, which sustains the position as against an endorsee: *a fortiori*, it will hold where the party is primarily liable. (19 Ves. 216, and note.)

As to the commercial usage referred to, see 1 Nott & McCord, 440; Chit. 203-4; 2 Cain. 343; 2 Whar. 377; 13 Johns. 471.

That a suit may be commenced on the third day of grace is so decided in Maine, Massachusetts, New Hampshire, Maryland, South Carolina, and in the Federal Courts. (14 Mass. 120; 1 Pick. 405; 3 Pick. 414; 9 Pick. 420; 19 Pick. 117; 21 Pick. 311; 5 Mass. 449; 1 Met. 43; 4 Green, 411; 3 Maine, 67; 7 N. H. 201; 7 Gill & J. 88; 1 Nott & McC. 440; S. C. U. S. 2 Wheat. 77; Ib. 273; 6 Ib. 102, 104; 1 Johns. Ca. 329.)

Where a suit was commenced before demand made, and objected to, the cause of action not being perfect, the Court overruled the objection. (21 Pick. 269; 5 N. H. 227.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

It is contended that suit may be brought on a promissory note on the day it becomes due, and several authorities have been cited which have so determined. We prefer adhering to the reasonable rule, which has been long established, that the payee has all of the day on which the note falls due in which to pay it, and therefore that a suit commenced on that day is premature. The cases which decide otherwise subvert the general principle of law for the seeming purpose of remedying particular cases of hardship.

We are satisfied that a departure from a reasonable and well-settled doctrine is productive of too much harm in the future to authorize us to adopt it, howsoever much it may be merited in a given case.

Judgment reversed.

***TARTAR, Respondent, v. HALL, Appellant. [263]**

¹ **ESTOPPEL, BY DEED.**—A party is not allowed to controvert the declaration he has made by deed.

IDEM, BY MORTGAGE.—The defendant bought of the plaintiff a preemption right to a tract of land, the title to which was in the United States, took a deed for it, and gave his note for the purchase-money, secured by his mortgage of the premises conveyed. The plaintiff brought suit for the recovery of the note and mortgage, and defendant pleaded want of consideration. *Held*, that the mortgage operated an estoppel to the defence set up.

APPEAL from the Ninth Judicial District.

This action was brought for the recovery of a promissory note, dated the 28th October, 1852, for \$1864, payable March,

¹ Approved, *Redman v. Bellamy*, 4 Cal. 250. Cited, *Clark v. Baker*, 14 Cal. 634; *Kirkaldie v. Larrabee*, 31 Cal. 457. See *Haffley v. Maier*, 13 Cal. 14; *Whitney v. Beckman*, Id. 586.

1853, from defendant to plaintiff; and the complaint sets forth a mortgage of the same date, for securing the payment of the said note, on the day specified, which mortgage is a lien upon the land described, "a preëmption claim of 160 acres of land, subject to the survey of the government," and which was on the day of the execution of the said mortgage transferred by the plaintiff to the defendant; and which contains a power to plaintiff to sell the said described premises, and apply the proceeds thereof to the payment of the said note; and prays judgment for the amount of the said note, and interest, for a receiver, and that the said premises may be sold to pay the same.

Defendant answered and admitted the making and delivery of the promissory note in the complaint mentioned to the plaintiff, and that the same had never been paid; but denied that the same was so executed and delivered for any consideration which is valuable in law, and insists that he is not liable for the same; and denies that the said mortgage was or is a lien upon the said tract of land; and avers that at the time of the conveyance thereof, the plaintiff did not possess any right, title, estate, or interest in the same, and had no power or authority to convey the same, and had no preëmption right to the same, or to any part thereof; that said lands

were not a part of the public lands of the United States, [264] but were and are a part of a tract of land *included in a grant from the government of California, while it formed a part of the Mexican Republic, to one Peter Lassen, issued in the year 1844 or 1845, and is still claimed by him or his grantees; and therefore that the consideration of the said promissory note, and the said mortgage, has entirely failed, and defendant insists he is not bound to pay the same, nor liable therefor; and prays that the plaintiff be decreed to surrender up the said promissory note, and to satisfy of record the said mortgage.

The Court, sitting as a jury, found that the plaintiff executed and delivered a conveyance to the defendant, of 160 acres of land, *belonging to the United States*, described, as laid in the complaint, and delivered possession thereof to the defendant, and found the promissory note as laid; and that there

was no other consideration for said note than the said conveyance, and also the mortgage as laid, and that the note was unpaid.

That the land had been claimed by Peter Lassen, and his grantees, under a Mexican grant of 1844, but the boundaries not having been proved, it does not appear to the Court that the said land is embraced within the limits of the said grant.

The Court, therefore, find the following conclusions of law: That the want of title in the plaintiff to the lands conveyed, by reason of the fact that they belong to the United States, cannot avail the defendant as a defence to the said note, such defence not having been set up in the answer of the defendant; and that the defence set up that the said lands are a part of land claimed by Peter Lassen, under a Mexican grant, cannot avail, the boundaries of said grant not having been proved, nor that the grant had ever been confirmed.

Whereupon judgment was rendered for the plaintiff, for \$1864, with interest from March 1, 1853, and costs. And it was ordered that the property described in the complaint be sold, and the proceeds applied in payment of the said judgment, and execution for the balance, if any.

The conclusions of law were all excepted to, and defendant appealed.

Field, for Appellant.

There was no act of Congress extending the pre-emption *system over California, at the time the note [265] was given. A settlement on lands of the United States, previous to a sale or lease by the United States, works a forfeiture. (Gord. Dig. 642, art. 2267.)

By the State law, a party is only protected in his possession. He has no right which he can convey or mortgage. It is a mere police regulation affecting the person. *Quære*, if under sec. 5, he could maintain any action for the possession? (Laws of 1852, p. 159; 2 Bags. S. C. Rep. 76; Knapp's Lessee, 3 Pick. 457; 11 Con. 432; 14 Pick. 295; 11 Johns. 50; 1 Ser. & R. 447; 4 N. H. 448; 14 Pick. 217; Sto. Prom. Notes, sec. 187, 190; Statutes of 1850, p. 333, sec. 5.)

Delivery of possession constitutes no valuable considera-

tion. Plaintiff was a trespasser himself. (Gord. Dig. 642; 5 Purd. 98; 1 Spear, 125; 3 Pick. 458.)

It would have been bad pleading to set forth in the answer the *evidence* that the note was without consideration. A valuable consideration is denied in the answer, and defendant insists that he is not therefore liable.

The act of Congress, passed 1853, excepts from preëmption "lands *claimed* under any foreign grant or title." The *claim* of Peter Lassen, under his Mexican grant, was therefore sufficient to defeat this action.

Rowe and Dunn, for Respondent.

Contracts under seal are valid without consideration. (8 Mass. 162, 200; 2 Noys, 159; 9 Mass. 124.) Executed contracts carry with them the evidence of consideration. (11 Pick. 146; 15 Mass. 171; 14 Pick. 293; 3 Pick. 452; 2 Greenl. 390.)

An injury to the party making, and a benefit to the party receiving, will support a promise. (1 Caine, 45; 6 Mass. 58; 2 Pick. 182; 6 Yerger, 508.)

Consideration on sale of land, quit-claim, etc., see 5 Greenl. 435; 2 Fairfield, 381; 11 Wheat. 258; 5 Burr. 2069; 16 Mass. 332.)

Quit-claim to public lands is a good consideration for a promise to pay money. (Illinois Rep. 270; *Snyder v. Leframboise*, 3 Scam. 387; 2 Scam. 505; 3 Scam. 428, 503; [266] Greenl. *352; 2 Blackf. 123; 1 Yates, 483; Green's Iowa Rep. 409, 410.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The mortgage executed by the defendant operates an estoppel to the defence he has set up. According to well-established principles of public policy, for the security of good faith and fair dealing, a party is not allowed to controvert the declarations which he has made by deed, or to deny the enforcement of rights which he has thus attempted to confer.

Judgment affirmed.

LEWES, Respondent, v. THOMPSON, Appellant.

EXECUTION DEED BY DEPUTY.—A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. If executed in his own name, it is decisive against the party claiming under it.

APPEAL from the Sixth Judicial District.

This was an action to recover possession of a tract of land. In producing his title, the plaintiff gave in evidence a deed executed by the deputy sheriff in his own name, arising out of the foreclosure of a mortgage, under which plaintiff claimed. The deed was excepted to, but admitted by the Court, who rendered judgment for the plaintiff. Defendant appealed.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

Although a sheriff's deputy may execute a deed for property sold under execution, he must execute it in the name of the sheriff. This principle has been settled by a long current of authorities, and as it is decisive of this action, it is unnecessary to enter into the consideration of the other questions raised on the record.

Judgment reversed, and cause remanded.

***MCGILVERY, Appellant, v. MOORHEAD et al., [267]
Respondents.**

JOINT CONTRACT, RIGHT OF ACTION ON.—Where a joint contract was made by M. and C., for the purchase of a quantity of flour of defendants, and the defendants delivered one portion of the flour to M., and another to C., on their respective orders, and received payment from them severally, and settled with C., and then cancelled the contract with regard to him, and M. afterwards sued for damages, alleged to have been sustained by him alone, on the contract. *Held*, that if plaintiff relied upon the original contract between him and C. and the defendants, he could not sue without joining C. in the action.

APPEAL from the Fourth Judicial District.

¹ Cited, *Bowley v. Howard*, 28 Cal. 408.

The plaintiff's complaint set forth that defendants were partners in trade, and that on the 21st of November, 1851, the plaintiff, together with Chapman, purchased of defendants all of their remaining stock of Chili flour, amounting to 6151 bags, of 200 pounds each, at the price, round, of —, payable, \$8000 in advance, to be deducted from the last payment, and the balance to the amount of such order, as the same should be given for delivery; that said lot of 6151 bags of flour was made up of several smaller lots, parts of different cargoes, and was represented by defendants to the plaintiff and Chapman, at the time of purchase, as being composed of 4080 bags of merchantable flour, and the balance of damaged flour, not strictly merchantable, yet proper for breadstuff. That although said purchase was made in the joint names of plaintiff and the said Chapman, it was understood and agreed between them, and between them and the defendants, that plaintiff was to have of the lot 3000 full bags, of two quintals or 200 pounds each, of merchantable flour, and the said Chapman the balance of the merchantable flour, and all of the damaged or inferior; that defendants had delivered to said Chapman his portion of the said purchase as aforesaid, and received payment therefor; that plaintiff had received all his complement of said lot, except 100 bags of merchantable flour, and made payment therefor, as stipulated in the contract, except 495 bags of damaged flour, which he received as part of his complement, the defendants making him a deduction of price therefor, and avers that the [268] whole of the flour delivered to him as *merchantable, and paid for as aforesaid, under his contract, etc., was inferior and not merchantable, as warranted by the defendants' representations, and that he has sustained a loss of one dollar per bag by reason thereof.

The defendants, in their answer, admit a contract respecting a sale of a lot of flour, but deny that it was of the character stated by plaintiff, and aver that the contract was reduced to writing, and set forth a copy in their answer, as follows: "It is hereby understood and agreed by and between Moorhead, Whitehead, and Waddington, of the first part, Freeman, McGilvery, and George W. Chapman, of the second

part, that the said M., W., and W., have sold, and by these presents do sell unto the said party of the second part, all the flour which they have remaining on hand, unsold, at this date, amounting to 6151 bags, of two quintals (200 pounds) each, more or less, which includes all the 'Java's' cargo, being equal to about 1421 full bags, as well as all the flour that may be otherwise damaged, at the price of \$10 per two quintals, payable \$8000 in advance, to be deducted from the last payment, and the balance, to the amount of such order, as the same may be given for the flour, the last order to be given and the payment made on or before the 15th of December next. The flour to be counted over by the parties hereto, and to be placed on the ship 'Regulus' at the expense of the sellers, to be at the expense and risk of the purchasers on and after the 28th instant. In witness whereof, we have hereunto set our hands, at San Francisco, this 21st day of November, 1851.

"FREEMAN MCGILVERY.

"GEORGE W. CHAPMAN,
"by D. WHITNEY.

Witness,
"JOHN SAMUELS."

"MOORHEAD, WHITEHEAD
"& WADDINGTON."

There was a clause added, extending the time of payment, which has no bearing on the question decided.

The answer also admits that Chapman had received a portion of the flour, and paid for it, and avers that plaintiff has received the remainder of the said flour, and paid for it, and denies all the other allegations in the bill; and further says that the *contract with plaintiff and said Chap- [269] man, being a joint and not a several one, plaintiff is not entitled to sue alone on said contract, but that said Chapman should have been joined in this action, either as plaintiff or defendant, as required by law, and prays to be dismissed, etc.

The plaintiff offered proof of a subsequent valid agreement between McGilvery and Chapman and defendants, to sustain the allegations of his bill, which defendants' counsel objected to, on the ground that it would be a variance of the terms of a written contract by a subsequent parol understanding made

without any consideration. The Court admitted the evidence, and plaintiff excepted. The witness (agent of Chapman) testified that the delivery to Chapman of the flour was separate. He considered the transaction joint only so far as the purchase was concerned. The delivery to McGilvery was separate, and the payment separate. At each delivery, Chapman paid the purchase-money, to the satisfaction of the parties. The written contract was cancelled, so far as Chapman was concerned, by the witness as agent of Chapman. "I suppose, as far as he is concerned, the matter is entirely closed. Chapman claims nothing from defendants." The contract was cancelled at the suggestion of Brown (a clerk of defendants.) The understanding between McGilvery and Chapman was made before the written contract was signed; could not say that Moorhead knew of it, nor that this understanding was part of the agreement with Moorhead. (It was in evidence that the contract was made with Moorhead, one of the defendants.) There was no contract with defendants as regards this understanding. Subsequent to the execution of the written contract, witness told the defendants of this private understanding, and told them that Chapman, instead of paying \$10 for the flour, should only pay \$8 75 per sack. They insisted on payment of the \$10, but Waddington said that he had money of McGilvery's in his hands, and in the final settlement would protect Chapman.

On his cross-examination the witness said the words "cancelled on my part," written on the original agreement, were written by me (Chapman's agent) at the suggestion of Brown (defendants' clerk.)

[270] *The foregoing is the substance of the evidence adduced by the plaintiff bearing on the question considered in this Court.

After the plaintiff had closed, the defendants moved for a nonsuit, on the ground that Chapman was a necessary party to the suit, and that the evidence of plaintiff did not sustain his action; which the Court overruled, and left it to the jury to say whether Chapman had any remaining interest in the action, and charged, if they found that Chapman had any interest, to find for defendants.

The jury found for plaintiff \$——, for which judgment was entered, and defendants moved for a new trial, which the Court ordered, and from this order plaintiff appealed.

Hastings and Thomas, for Appellant.

It was understood between the parties that each party purchaser to the contract was to have a certain portion of the flour, and that Chapman had received his portion and accounted for it with plaintiff.

The written contract was cancelled so far as Chapman was concerned, and he had no interest in it. (*Heath v. Leech*, 1 Cal. 412.)

The witness's testimony proved the separate delivery of the flour to Chapman, and that plaintiff was to have 3000 bags of merchantable, etc., and Chapman the damaged flour, etc.

Where a contract has been made, and at a subsequent period another contract between the parties, having reference to the same subject-matter, but changing the relations of the first, the last controls the first, though there be no such effect expressed. (5 Ham. 380.) Here the first joint contract was annulled as to Chapman, and the last contract made several as to McGilvery, who sues for the breach. (See also 2 Greenl. Ev. 30, 31, and 5 N. H. 136.)

No brief for respondent on file.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This appeal is prosecuted from the order of the Court below, granting a new trial. The only question for our consideration *is, whether Chapman should have been [271] joined as a co-plaintiff. It is evident that if the plaintiff relied upon the original contract between Chapman, himself, and the defendants, he could not sue without joining Chapman.

There is, on the other hand, no sufficient proof going to establish the alteration of the original or the substitution of a new and independent contract, and even if there was, the instructions refused by the Court in relation thereto would be error.

Judgment reversed, and new trial ordered.

THE PEOPLE, ETC., Respondents, v. FANNY SMITH
and REUBEN RAGNES, Appellants.

BAIL BOND, ACTION ON.—Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending.

IDEM, INSUFFICIENT ALLEGATIONS.—If the condition be to appear “wherever the indictment may be prosecuted,” and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called “in the said Court of Sessions” is not sufficient.

APPEAL from the Sixth Judicial District.

This action was founded upon the bond of defendants, which stated that an indictment was found, on the 31st Dec., 1852, in the Court of Sessions of Sacramento County, charging Fanny Smith, alias Seymour, with an assault with intent to commit murder; and she having been admitted to bail in \$3000, the defendants undertook that the above Fanny should appear and answer the said indictment, in whatever court it may be prosecuted; and if she fail, that obligors would pay. etc.

The complaint set forth that defendants, on the 31st December, 1852, made an obligation, which is referred to as part of the complaint, by which they bound themselves to plaintiffs in \$3000, if default of certain conditions therein named should be made by Fanny Smith, alias, etc.; and avers that “Fanny, at the time at which she was, according to the condition of the said undertaking to appear, etc., [272] did neglect and make default in the *fulfilment of the terms of said undertaking and condition; although called, on the 7th February, A. D. 1853, in open court, of said Court of Sessions, to answer to said indictment in said undertaking named,” “and then and there the hereunto annexed undertaking was declared operative.”

Defendants appeared and demurred to the complaint, for divers causes set forth, among others: That the complaint does not show that any valid indictment was found by any legally constituted tribunal; by what authority the accused had been admitted to bail, nor where, or upon whom, she committed an assault, etc. The undertaking does not stipu-

late a time or place or tribunal before which the accused should appear.

The Court, after hearing the case, overruled the demurrer, and gave judgment in favor of plaintiffs for \$3000 and interest; from which defendants appealed.

Sanders, Edwards, and English, for Appellants.

The averment that an indictment was found, etc., does not establish that it was found by a grand jury, or that it was in writing, preferred upon oath. (4 Black. Com. 299; Statute of 1851, 234 and 206.) The law declares before whom bail shall be taken. (See statutes, secs. 265, 268, p. 269; and how forfeiture shall be declared, sec. 3, 535, Ib.; and the mode of proceeding thereon, sec. 537; with which provisions the averments of the complaint do not correspond.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The declaration in this case is too defective to support the judgment. The bond given was to appear and answer an indictment: there is no averment that any indictment was found or pending. One of the conditions is for her appearance in whatever court the indictment "may be prosecuted." There is no averment in what court it was prosecuted, but only a loose statement that she was called in "the said Court of Sessions."

Without referring to any other defects, these pointed out are sufficient to show that the demurrer should have been sustained.

Judgment reversed, and case remanded.

[273] *CHIPMAN et al., Appellants, v. EMERIC,
Respondent.

FORFEITURE OF ESTATE FOR YEARS.—At common law there was no forfeiture of an estate for years, for the non-payment of rent, nor for the commission of waste.

IDEM, FOR WASTE.—By the Statute of Gloucester, 6 Ed. 1, the remedy of forfeiture was given for waste, and it was expressly confined to the place wherein the waste was committed.

IDEM, STATUTORY CONSTRUCTION.—The Statute of California confines the remedy to the recovery of treble damages.

¹ **FORCIBLE ENTRY AND DETAINER.—DEMAND.**—By the 18th section of the act, concerning forcible entries and unlawful detainers, it was the intention of the Legislature to make the non-payment of rent work a forfeiture of the estate of the tenant. But to effect this, the rent must be demanded on the day it becomes due, and at a late hour of the day.

¹ **IDEM** —Where the record shows no demand of the rent, there can be no forfeiture.

APPEAL from the District Court of the Third Judicial District.

This was a proceeding in forcible detainer, commenced before a Justice of the Peace, in the township and county of Contra Costa.

The plaintiffs say, that on the 21st February, 1851, Antonia Maria Peralta, leased to José Dessassier and José Maria Payot, the tract of land known as the Encinal San Antonio, part of the Ranch known as the Ranch San Antonio, and containing about 3000 acres; that about the — day of June, 1851, the said Dessassier sold his interest in said lease, to the above-named defendant Emeric, and J. M. Payot, and that on the 20th October, 1851, the said Peralta gave his written consent to the said transfer to Emeric, which is endorsed on the said lease; that on the 21st October, the said J. M. Payot, transferred to the said Emeric, his interest in said lease; that on the 23d October, 1851, the said Peralta transferred to the said plaintiffs, Chipman and Aughenbaugh, the said lease of the said Encinal, which transfer is endorsed upon said lease; that said Payot and Dessassier, gave to said Peralta a written lease or agreement for said Encinal; of which with the endorsements profert is now made.

¹ Cited, *McGlynn v. Moore*, 25 Cal. 397; *Gage v. Bates*, 40 Cal. 385. See *Gaskill v. Trainer*, post 334; *O'Connor v. Kelly*, 41 Cal. 494.

That on the 22d October, 1851, the plaintiffs purchased by deed of the said Peralta the said Encinal, and are now the legal and sole owners of the same, and make profert of the said deed; that said Payot does not claim any right under the said lease, *nor has he any possession of the [274] said premises, and said Emeric has had the sole possession thereof, and has claimed the sole right under the said lease, and in the said premises, since the 20th October, 1851; that he went into possession under the said lease and transfer to him, made by said Dessassier and Payot as aforesaid, and is still in possession and occupancy of the same; and plaintiffs say, that said defendant holds over the said premises contrary to the conditions and covenants of the lease under which he holds, and after rent has become due, according to the terms thereof, and has remained unpaid for the space of three days.

That plaintiffs, about the 20th April, 1852, and also about the 25th March, 1852, and after defendant wrongfully held over as above stated, made a demand in writing of said defendant, that he should deliver the possession of the premises to the plaintiffs; but defendant has refused to quit the possession thereof, and has refused and still refuses to pay rent for the same. Plaintiffs therefore pray that defendant may be compelled to pay the amount of rent due, \$280; and damages for holding over; and for a writ of restitution for the said premises.

The defendant's answer admits possession of the premises; the lease of 21st February, from Peralta to Payot and Dessassier; the transfers to him by the latter on the 20th October, and by the former on the 21st October, 1851; that on the 23d October, said Peralta transferred to the plaintiffs the said lease; and that defendant has had, and still holds the possession, and claims the sole right to the said premises under said lease; and says that he went into possession under the lease from Peralta, and the transfers thereof; and denies that he holds over the premises contrary to the conditions and covenants thereof. And further says, that the plaintiffs have been, and are, undertenants of this defendant, of a certain portion of the said Encinal, rendering rent therefor, and for

both bind ourselves to pay '*mon comune in solidum*' the \$140, which is the monthly sum that corresponds to the amount of \$1680 yearly, which is the total amount of the five years, as is already expressed in the first clause, until the end of the six years; and it will be successively observed the same.

"3d. The lessees bind themselves to fulfil all that has been stipulated in the first clause, promising that in [277] case of our failing *to fulfil our obligation, we give to Don A. M. Peralta his right, without diminution, I, and my partner, and shall have no right to any reclamation whatever.

"4th. In the same manner, we bind ourselves to allow Mr. Peralta to cultivate all the land he may require, as also any of his brothers: we also give him the right to take from said property all the wood he may want for home consumption, and also for wintering his cattle.

"5th. The lessees both consent to our not-being able to transfer this lease to any person, unless it be with the consent of Don Antonio Maria Peralta; and in case we should do it, we both shall be responsible for all damages against the interests of said Antonio Maria Peralta.

"6th. We bind ourselves to leave to Don A. M. Peralta, at the end of the six years of this contract, all the benefit of the embarcadero or wharf that we bind ourselves to make on taking possession of said property, houses, yards, canals, etc., and in fine, all the improvements that may exist, we having no right to any compensation.

"7th. We pay and give to Don A. M. Peralta \$240 in advance, on account of the rent, it being understood that said sum so advanced shall be deducted at the time of our returning this contract, or rather in six years, which is the time when it shall be cancelled.

"8th. We, the undersigned, say that we bind ourselves in due form to fulfil all the foregoing stipulations, and we bind ourselves, with all goods and chattels now belonging or which may belong to us, and so that it may be binding, we give to this contract the form of a public document as passed before the authority, we renouncing all laws and rights in our

favor; and for better security, we both sign two of them of the same tenor and date.

"Messrs. J. M. Payot and José Dessassier can maintain on the said leased property all the horses, mules, and cattle, that they may want for their use, as also they may maintain as many as fifty milch cows. Don A. M. Peralta also allows to open a trench or canal from the creeks that are found on the eastern part of the property, leaving the said gentleman all the right *that corresponds to him, to indicate [278] to us the point most convenient to him.

(Signed)

"G. M. PAYOT,

"Witnesses,

"ANT. MAR. PERALTA,

"FRANCIS A. IREANS,

"JOSE DESSASSIER.

"JOSE GARCIA ALARAUS.

"San Antonio, 21st February, 1851."

The referee reported that, at the commencement of the action the sum of \$280 was, and still is, due from defendant to plaintiffs, and that the plaintiffs were not entitled to have restitution of the premises referred to in the complaint; and that plaintiffs are entitled to judgment against defendant only for said sum, with interest from 21st of April, 1852, and costs. Dated, January 15th, 1853.

Plaintiffs, by their attorney, appealed from the above judgment, so far as forfeiture of the leased premises and restitution thereof is denied, and also as to the refusal to give treble the damages, the same having been duly demanded by the plaintiffs.

Chipman, for Appellants.

The finding of the rent due, by the referee, and costs, is conclusive against any tender defendant may have pleaded, and we are entitled to *restoration of the premises*.

After the rent remained due three days, plaintiffs, March 25th, 1852, notified defendant to quit, the notice following the words of the statute, and alleging a breach of covenants generally.

April 17th, a second notice was given to quit, for breach of covenants and non-payment of rent, when defendant first ten-

dered \$140, with some receipts for rent claimed by him to be due from plaintiffs. If such rents as were claimed by defendant were due to him, the acquittances were no tender: coin only, and not paper, debts, notes, etc., is good as a tender.

But no such note was due. The lease to plaintiffs, from the assignees of the defendant, of January 23d, 1851, guaranteed a certain piece of ground in said Encinal, "*free from all incumbrances.*" In this covenant, the lessors and their assignee, the defendant, failed, as there were prior in-
[279] cumbrances, two leases *from Peralta, which were retained till transferred by Peralta to plaintiffs in October, 1851.

Can the defendant assume an indebtedness which is totally denied, and apply it, not as a set-off, but as a legal tender, and this upon a debt due the plaintiffs and not denied?

Our purchase of the fee, October 1851, from our landlord, merged the lesser title, ended the lease, and stopped the rent. But if the rent was apportioned, and the plaintiffs charged in accordance with the respective interests under the lease of January 23d, 1851, it could not be used as a tender.

The payment of \$280 with costs was withdrawn: if good as a tender it was not *kept good*.

Under the statute, it is an unlawful holding, "where any holder shall hold over after the rent shall be due, and remain unpaid for the space of three days;" and the Justice, after judgment, is directed to give a writ of restitution, as in other cases. (See sec. 13, p. 420, statutes of 1850.) And if restitution is not to follow the breach of defendant's covenants, and if a tenant may commit waste, and pay no rent, and continue to enjoy, etc., the summary remedy sought to be provided by the statute is of little avail.

The provisions of the statute are entirely independent of the common law, and the directions in the proceeding are plain, without any reference thereto: no provision requires a clause of re-entry, nor demand before sunset on the day the rent falls due, etc.

If the proceedings are substantially correct, no objections to form will be regarded. (2 Bibb, 431; Barrett v. Chitwood.)

A tenant holding over, even on a parol lease, is not entitled to notice to quit before the emanation of the warrant. (4 Bibb, 524; 11 Wend. 616; 6 Hill, 507.)

By the same reasoning, a tenant holding over contrary to any other provision of the law, is entitled to notice, before a warrant can emanate, and writ of restitution issue, and our statute fixes the notice to be three days.

A covenant to pay rent is the very basis of the tenure in almost every lease. To say that this covenant is like any other debt to the landlord, is inconsistent.

*The statute gives the re-entry, and it is only necessary to follow the forms of proceeding under the statute. (N. Y. Dig. 382, 3, 4, sec. 133, 4, title Landlord and Tenant.) [280]

The language of article 8, in the original lease intends to secure to the landlord all *his right without injury*, as specified in article 3d, which is clearly a right reserved, to re-enter, and "take safe back his rights without any reclamation." Article 8th, renouncing all laws and statutes in the tenant's favor, gives Peralta the right to re-enter, for a failure on the part of the tenant to perform the stipulations in the first clauses, which were to pay rent.

Sloan, for Respondent,

Stated some facts preceding the lease on the record. In August, 1850, Dessassier and Basquit went into possession of the Encinal, under a verbal lease from Peralta for five years, for the purpose of cutting wood and making charcoal. A lease was drawn, but was never executed. In November, 1850, Basquit quit the concern, and retired, when Maitre took his place, who, with Dessassier, continued the business. On the 23d, Dessassier and Maitre leased to Chipman and Aughenbaugh a certain part of the Encinal for four years and a half, from the 1st February, 1851. Maitre retired, and Payot came into his place, and on the 21st February, 1851, the lease on the record from Peralta to Dessassier and Payot were executed. The cutting of wood and making of charcoal were continued by them and their successors until they were enjoined by the plaintiffs, about the 1st November, 1851. The

respondent soon after this acquired an interest in the lease, and subsequently the whole was transferred to him, with the consent of Peralta.

On the 26th March, 1851, the appellants procured from Dessassier, Emeric, and Payot, their confirmation of the sub-lease from Dessassier and Maitre to them, made 1st February, 1851, by endorsement, viz.: "The written lease is hereby confirmed by us this day, we having become the lessors of the within-described ground from Don Antonio Peralta. Our Company consisting of Joseph Dessassier, Joseph Emeric, and J. M. Payot. March 26, 1851.

(Signed) "J. M. PAYOT & Co."

[281] *On the 16th October, 1851, the appellants, then lessees of Emeric for part of the Encinal, for a term to end the 1st August, 1855, contracted with Peralta to purchase the reversion upon the term to Emeric, to end the 21st February, 1857, and Peralta, on the 22d October, 1851, executed to appellants a deed of conveyance, and delivered to them his copy of the lease with Emeric.

Thus, while the ultimate reversion vested in the appellants, the intermediate reversion of the part underlet to them vested in Emeric.

The appellants insist that Emeric has forfeited his lease on two grounds: 1, non-payment of rent; 2, the commission of waste.

There was no forfeiture for the non-payment of rent. The lease contains no clause of re-entry for this cause. The payment of rent is not made a condition of the tenure: it is a mere covenant, and no rule of law, statutory or common, works a forfeiture for this more than any other debt owing to his landlord. Such termination of a tenancy can only arise under an express agreement of the parties. (Adams on Ejectment, 157, 158, 160, and cases cited.)

The act gives no remedy unless the tenant *holds over: failure to pay is not sufficient.*

There can be no holding over where the term is not ended by efflux of time, or the act of the parties, or when the tenant has committed an act of forfeiture. (Norris & Peake, 528, sec. 3; Ib. 531 to 534; 4 Barn. & Ald. 401; 6 Eng. Com. Law

Rep. 535; 6 Bar. & C. 519; 13 Eng. Com. Law Rep. 238; Adams on Ejectment, 160.)

If the act be held to impose a forfeiture for non-payment of rent in the absence of a stipulation to that effect, still demand must be made "before sunset," as at common law. (*Jackson v. Harrison*, 17 J. R. 66; Adams on Ejectment, 160, 161, 162; 6 Esp. 106.)

The strict common law rule is insisted on where it has not been repealed in all cases. (Adams on Eject. 162 to 192.)

In this case, the tender made would prevent a forfeiture, even if the right to re-enter had been reserved. Defendant was in *possession of the part of the premises [282] under a rent of \$80. Why should he not have the right to recoup this sum? Why pay \$140 per month for the whole, when they had in effect got back a part? One claim should compensate the other, and the balance only should be recovered. (8 Wend. 109; 3 Hill, 174.)

The commission of waste by a tenant for life, or a term of years, does not in this State work a forfeiture, but only subjects him to the payment of treble damages. At common law, waste was punishable when committed by guardian in chivalry, tenant in dower, or tenant by the curtesy, because their estates were created by act of law; but where the tenant came in by demise, and could have provided against it, and did not, it was his own default. The remedy was extended to tenants for life and for years by the Stat. of Marlbridge, 52 Henry III., c. 23, and of Gloucester, 6 Edw. I., c. 5. By the latter, the forfeiture did not extend to the whole premises, but to the place where the waste was committed. (2 Bla. Com. 282, 283, 286.)

The Stat. of Gloucester is not in force here. (See acts of 1851, p. 92, sec. 250.)

No statute of this State imposes forfeiture for waste, or other penalty than treble damages.

It is contended the respondent had no right to cut wood under the lease, the waste complained of. A writing may be read by the light of surrounding circumstances, and parol evidence is admissible to disclose this, not to ascertain a secret intent, but the meaning of the words used. (1 Greenl.

Ev., sec. 277, 278, 279, 280, 282, 283, 284, 286, 287, 288, and 295.)

The acts of the parties, or usage, may be proved to explain doubtful words or clauses in a deed. (3 Phil. Ev. 139, note 954; 16 J. B. 14, 23; 7 Pick. 274.)

The lease, it is evident, was not made for farming purposes, for the right to cultivate the soil is retained by the lessor.

A right to graze a few cows and horses is given to tenants. In mining leases, the intent of the parties is ascertained by showing the use made of the premises before and at the time of the lease, and parol proof is adequate to show this. If mines were open before the lease, it is not waste in the [283] tenant to *continue digging for his own use, for it is now become the mere annual profit of the land. (2 Black. Com. 282; 22 Vine's Abr. 439, 440; Coke Litt. 54 b; Coke's Rep. B. 5; Saunders' case.)

The preceding lessees were cutting and charring wood, Peralta consenting, up to the time of their lease to defendant.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The appellants say that the estate of the defendant (a term for years) is forfeited, for two reasons: first, for the non-payment of rent; second, for the commission of waste.

At common law, there was no forfeiture upon either of these grounds. It was only by the Statute of Gloucester, 6 Ed. I., that the remedy of forfeiture was given for waste, and it was then expressly confined to the place wherein the waste was committed. (2 Black. 283.) Our statute confines the remedy to the recovery of treble damages. (Laws, 566, 52, 59.)

In reference to the first point, I can come to no other conclusion than that, by the 13th section of the act concerning forcible entries and unlawful detainers, it was the intention of the Legislature to make the non-payment of rent work a forfeiture of the estate of the tenant. In order to effect this, however, it must be held necessary to pursue the same strictness as is required at common law to work a forfeiture, where there are stipulations in the contract of lease to that effect. The rent must be demanded on the day it becomes due, and

at a late hour of the day. (See the case of *Jackson v. Harrison*, 17 J. R. 66, and the cases there cited; *Adams on Eject.* 160; *Gaskill v. Trainer*, post 334.)

The record in this case discloses no demand whatever of the rent, and it follows there can be no forfeiture.

Judgment affirmed.

***ALFRED WHEELER, Respondent, v. JOHN C. [284]
HAYS, Sheriff, Appellant.**

¹ **FINDINGS BY THE COURT, EFFECT OF.**—When a jury has been waived by the parties, and the Court find the facts, the facts so found have the same legal effect as if found by a jury, and not being the subject of review in this Court are therefore conclusive.

APPEAL from the Fourth Judicial District.

The complaint in this case set forth that Charles Brown and Robert T. Ridley, on the 17th March, 1851, became endorsers of a promissory note for \$1275, made by E. D. Smith in favor of W. G. Taylor, payable thirty days after date, upon which, on the 23d April, 1851, suit was brought by Taylor against the said drawer and endorsers, and judgment obtained against the said Brown and Ridley, July 2d, 1851, for \$1472 37 and costs. That an execution issued thereon to defendant, as sheriff, on the 21st July, who lived on a certain tract of land, the property of said Ridley, (describing it,) and set up and struck off the same on the 26th August to Frank Turk, for \$900, who refusing to pay his bid for the same, it was again set up for sale by defendant on the 6th September last, and struck off to the plaintiff for \$875, who paid the said sum to defendant, and demanded a deed for the same, who refused, and still refuses the same. That plaintiff further paid, on the 26th February, \$84 50, taxes unpaid and due on said property; that said property has not been redeemed since

¹ Cited, *Lyons v. Lyons*, 18 Cal. 449. See *McHenry v. Moore*, 5 Cal. 93; *Dewey v. Bowman*, 8 Cal. 145; *Ortman v. Dixon*, 18 Cal. 84; *Garwood v. Simpson*, 8 Cal. 108; *Gagliardo v. Hoberlin*, 18 Cal. 394.

the said sale, nor was it subject since the sale to any right of redemption whatsoever; wherefore the plaintiff prays the Court to decree a conveyance of the said property from the said defendant, sheriff, etc., to the plaintiff, according to law, and to enjoin him from conveying the same to any other person.

The defendant answered, that on the 24th February, 1852, Charles W. Stewart and Isaac N. Thorn, successors in interest of the said Robert T. Ridley, whose property was sold on the execution issued on the judgment of W. G. Taylor, redeemed the said property from said sale and paid [285] \$1117, as the principal and *interest due on such redemption, and the taxes due on the said property, and therefore plaintiff is not entitled to the deed which he seeks, and defendant should be dismissed, etc.

The case was submitted to the Court, a jury having been waived by the parties, who found the judgment, execution, levy and sale, and payment by plaintiff as stated in his complaint, the refusal of the sheriff to make the deed, payment of the taxes as stated, and that the value of the property was \$5000. That on the 25th February, 1852, Charles V. Stewart and Isaac N. Thomas, claiming to be successors in interest to said Ridley, and as such to have the right to redeem, tendered and paid to defendant, as sheriff, \$1117, the amount of purchase-money and taxes paid by plaintiff, with eighteen per cent. addition to the said purchase-money. And the Court found that no successorship in interest to said Ridley has been set up or claimed, in the property sold to the plaintiff, except under a certain instrument in writing in the form of a deed, sealed and executed by said Ridley, on the 14th May, 1851, which was executed by him on that day to Stewart and Thorn, and that the description of the property which it purports to convey is as follows (the description here follows, not corresponding to the description of the property claimed by plaintiff.) That evidence extrinsic to said instrument was introduced by defendant, in the shape of a separate plot or diagram, in which the lines are represented and two additional lines enclosing about 114 acres. Said plan was not annexed to the deed, or filed, or recorded, but was in possession of said Stewart and Thorn; that the said instrument exe-

cuted by the said Ridley was entered or copied in the County Records on the 25th February, 1852, but does not stand recorded, for want of a proper certificate of acknowledgment or proof; and find that the premises described in the said instrument and the land represented in the said diagram are not the property sold by the said sheriff to the plaintiff in this suit, or any part or parcel thereof.

And the conclusions of law determined by the Court were, that said instrument, executed by Ridley on the 14th May, 1851, was a valid deed of conveyance to Stewart and Thorn, that the diagram was evidence for the purpose of defining, in connection *with said deed, the property [286] thereby conveyed, and that said deed conveys to the said Stewart and Thorn the land represented in said plot.

That the sale made to the plaintiff was within the provisions relating to the redemption of real property from execution sales, contained in the act of 29th April, 1851. That the said act gives to the judgment debtor, or his successor in interest, a right of redemption therein, where the contract on which judgment was recovered was entered into prior to the passage and taking effect of said act, and the sale on execution made after, and that said act is constitutional and valid.

That prior to said act, on the 1st July, 1851, there was no law in this State authorizing the redemption of real property sold on execution. That said Stewart and Thorn are not, and have not at any time, been entitled to redeem the property sold to plaintiff, or any part thereof. That said property has not been redeemed in the whole or in part, by said Ridley, or any successor to him in interest, or other redemption.

That the title in fee, at the commencement of this suit, fully and absolutely vested in the plaintiff, subject to no right of redemption. That plaintiff is entitled to receive from defendant, sheriff, etc., a deed of conveyance in fee for the property sold him, etc., and so decreed.

Defendant appealed.

Campbell, Brown, and Tracy, for Appellant.

Clark and McHenry, for Respondent.

Appellant contended that the case could not be reviewed under previous decisions of this Court. (*Hoppe v. Robb*; *Griswold v. Sharpe & Boyd*; *Brown v. Brown & Greives*; *Pachew v. Echeveria*; *Ingram et al. v. De Freemary*; *Dunn v. Clarke*.)

The opinion of the Court was delivered by **HEYDENFELDT**, Justice. **WELLS**, Justice, concurred.

The plaintiff filed a complaint, which, we suppose, was intended to operate as an application for a mandamus to compel the defendant, as sheriff, to execute a deed for a tract of land purchased by plaintiff at sheriff's sale.

The sheriff answers, as the reason for his refusal to [287] make the *deed, that the land had been redeemed by Stewart and Thorn as the successors in interest of the defendant in execution.

This presented the only issue of fact to be determined, and the Court found distinctly in favor of the plaintiff: 1st. That Stewart and Thorn are not the successors in interest of Ridley, the defendant in execution, and next, that the land claimed by Stewart and Thorn, as successors in interest to Ridley, is not the property sold by the sheriff to the plaintiff.

This finding of facts by the Court must have the same legal effect as if found by a jury, and therefore not being the subject of review by this Court, they are conclusive of the case. Judgment affirmed.

P. ORD, Appellant, v. LITTLE, Admr. etc., Respondent.

EXECUTORS AND ADMINISTRATORS, COMPENSATION OF.—Section 222 of the act to regulate the settlement of the estates of deceased persons allows compensation to the executors, according to the rates established, upon the whole value of the estate, both real and personal; but this rule only applies where the administration is complete, and the estate is finally settled.

IDEM, APPORTIONMENT OF COMPENSATION.—Where the administrator resigns, or is removed, leaving the administration incomplete, there is no fixed rule of compensation. The Probate Court should apportion it, in reference to the compensation fixed by law for the whole, according to sound judgment.

APPEAL from the District Court of the Third Judicial District.

On the 28th of August, 1850, an order was made by the Probate Court, Monterey county, directing the public administrator of Monterey county, P. Ord, to take possession and charge of the estate of W. R. Garner, deceased, of said county. The estate was duly appraised, and possession taken of it by the said administrator. The estate consisted of a ranch of 6895 acres and 8 lots in the town of Monterey, two of which were improved; and which was appraised at the sum of \$24,742 55. At the time the administrator took possession of the estate, the ranch near Monterey was under lease to the U. S. Quartermaster, at the monthly rent of \$32; as appears by the administrator's account, which lease began July 1st, 1850, and expired 31st *December, [288] 1850. The United States had also under lease a dwelling-house in Monterey, at the monthly rent of \$100. The administrator collected the rent of the ranch and the house, which amounted to \$1192; this was all the money he ever received belonging to the estate; and he disbursed \$856 16 debts due by the estate. He managed the estate prudently and faithfully; saved charges for counsel fees, (he being an attorney-at-law,) by appearing personally in court when necessary; and has faithfully delivered over to the administrator and guardian of the minor heirs, all the estate, title papers, etc.

The said public administrator filed his account 24th August, 1851; in it he charges the estate "commissions on \$24,742 53, the value of the estate, as per inventory, at 15 and 10 per cent.: the property handed over and accounted for, to Milton Little, guardian and administrator, \$1974." The whole of this sum was disallowed by the Probate Court, who only allowed the administrator's commissions on \$1192, cash collected by him on account of rents as aforesaid. From this decision he appealed to the District Court of the Third Judicial District for Monterey county. The following is a copy of the judgment of the Probate Court appealed from.

"Probate Court, Monterey County.

"In the matter of the estate of Wm. R. Garner, deceased. October Term, 1851.

“The Court having had the account in the settlement of this estate, as rendered by P. Ord, public administrator, under advisement, refuses to allow such part of the same as shows an item of per centage on the entire estate, whereas, in fact, only the sum of \$1192, as appears by said account, had actually been collected by said P. Ord, as public administrator to said estate; and the Court ordered that the clerk do alter said account, so as to allow said P. Ord, as such public administrator, the per centage allowed by law on the said amount so collected by him only, and the amount having been so altered by the clerk, was so by order of the Court audited and passed; and the same account, as audited and passed, showing a balance in the hands of the said P. Ord, as public administrator, in favor of the said estate of \$166 64, it is ordered and adjudged by the Court that the same [289] *be paid into this Court by the said P. Ord, administrator, etc., before the first day of the next term.”

The District Court confirmed the above judgment of the Probate Court, at appellant's costs.

The administrator Ord appealed.

It was admitted that at the time of the surrender of the estate by the said public administrator that it was, and still is, unsettled.

And by agreement of counsel, the case was submitted to the Supreme Court, without argument as to the amount of commissions upon the estate, if any, are due to the appellant, other than those allowed by the Probate Court.

P. Ord, for Appellant.

Ashley, for Respondent.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Section 222 of the act to regulate the settlement of the estates of deceased persons, providing for the compensation of the executor or administrator, allows him “commissions upon the amount of the whole estate accounted for by him;” and a previous section requires him to take into his possession “all the estate of the deceased, real and personal.”

The language of the act admits of but one construction. It allows compensation to the executor, according to the rates established, upon the whole value of the estate, both real and personal, but it evidently intends this rule to apply only to those cases where the administration is complete and the estate finally settled. The law cannot be construed to mean that the same rate of compensation may be allowed to a succession of administrators of the same estate, for if that were so, the estate might be eaten up beyond the power of prevention.

Where, therefore, an administrator resigns, or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has rendered.

In such a case, it is the duty of the Probate Court to examine into the nature and value of the services rendered, and comparing, as well as possible, that which has been done with what yet *remains to be done in the course [290] of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment.

The judgment is reversed, and the cause remanded.

**JEREMIAH CLARKE, Appellant, v. J. W. FORSHAY,
et al., Respondents.**

APPEAL, STIPULATION WHEN DISREGARDED.—Where a written stipulation is filed by the parties in the Court below, to govern the proceedings there, but has not been brought to the notice of the Court for its adjudication, the appellate Court will not regard it.

STIPULATION DISREGARDED, REMEDY.—If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the Court in which it was filed, or in some Court of original jurisdiction.

APPEAL from the District Court of the Fourth Judicial District.

This complaint was filed the 27th April, 1852, and the action was brought to recover a debt secured by mortgage, the defendants, White and Abel, claiming an interest in the mort-

gaged premises. It does not appear that Brannan, the mortgagee, answered or made any defence.

On the 14th September, 1853, the following stipulation was filed:

FORSHAY }
v. }
BRANNAN. }

In this case it is agreed that judgment be entered for the debt, interest, and costs, for plaintiff, and the sale shall not take place before the 21st day of October, 1852.

J. CLARKE.

THOS. C. HAMBLEY.

September 14th, 1853. The Court made this decree: That *the plaintiff recover of the defendant, Jason Brannan, \$969 71, with interest, etc.

That the said Brannan, Clarke, White, and Abel, and all persons claiming under them, to the 10th December, 1851, be barred and foreclosed all claim, etc, in the mortgaged premises; that the same be sold for the debt, etc., and the surplus, if any, paid to the said Clarke, and if sold for less than the debt, etc., then the said Brannan to pay the plaintiff the deficit, etc.

From this decree and judgment, J. Clarke, defendant, appealed.

Clarke, T aylor, and Buckley, for Appellant.

Hambly, for Respondents.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

A written stipulation between parties litigant, filed in the lower Court, to govern the proceedings there, will not be looked into by the appellate Court, for the purpose of revising the judgment below, where such stipulation has not been brought to the notice of the Court below for its adjudication.

If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the court in which it was filed, or in some court of original jurisdiction.

Judgment affirmed.

***J. B. STONE et al., Appellants, v. J. M. FOUSE [292]
et al., Respondents.**

PLEADING, CAUSES OF ACTION WHICH MAY BE UNITED.—The contract declared on contained a covenant for stipulated damages, and by the same contract, the parties were constituted partners. The plaintiffs prayed judgment for the liquidated damages, and for an account, and dissolution of the partnership. Defendant demurred, assigning for cause that two causes of action, the one of legal and the other of equitable jurisdiction, could not be joined, and the District Court sustained the demurrer. *Held*, that this was error.

PARTNERS, ACTIONS BY.—Partners cannot sue one another at law, for any of the business or undertakings of the partnership. This can only be done in Chancery, by asking for a dissolution and an account.

IDEM, DAMAGES.—If damages accrue in such proceedings, if liquidated, they can be settled by the Court; if unliquidated, by directing an issue to have them ascertained.

IDEM, ACCOUNTING AND DISSOLUTION.—Plaintiffs cannot sue on this contract in any form, without seeking an account and dissolution.

APPEAL from the Tenth Judicial District.

The complaint in this case was founded upon an agreement between the plaintiffs and defendants, which is set forth in the complaint, and which states that the plaintiffs and defendants had formed a company, called "The Empire Water and Mining Company," to be held in shares, the plaintiffs to hold five shares, and the defendants nine shares, divided between them, the whole number making fourteen shares, the property of the company. The party of the first part, the plaintiffs, conveying to the said defendants, of the second part, nine shares of a certain ditch and diggings, known as the Empire Water and Mining Company's property, (describing it,) and stipulating to complete the said ditch at their own expense, in such manner that it shall convey from its commencement to Grass Valley Slide, the water to be put into said ditch by defendants; and the party of the second part, the defendants, in consideration thereof, agree to convey to plaintiffs five shares, in certain other ditches described, to convey the water into the above ditch, to which the latter were to be joined, to complete the same, and to pay the plaintiffs \$900, in the manner set forth. It then recites that after the *execution of the said instrument, the in- [293]
terests should be united, and be under the direction

and management of managers chosen by the company. The parties to have their respective works completed by the 1st December, 1852; and in case either party should fail to perform, they shall pay to the other "the sum of \$1500, as liquidated, fixed, and settled damages."

The plaintiffs aver performance on their part, and allege failure on the part of defendants: First, in not constructing the ditches stipulated to be constructed and completed by them, by the 1st December, by which an action hath accrued to the plaintiffs to have from defendants the sum of \$1500, to be by them paid, as agreed, by the terms of the said agreement, for which they pray judgment, etc.

And further aver, that the objects of the said agreement have entirely failed, and said defendants have rendered it impossible, by their acts, to perform the said covenants in the manner contemplated by the parties thereto. Wherefore plaintiffs pray the Court, that an accounting and settlement be had between the said plaintiffs and defendants, and that the Court order and decree a dissolution of the said company, formed by said agreement, and that the same be cancelled, and for further relief.

The defendants demurred, alleging for cause, That one cause of action being to recover damages for the breach of a contract set forth in said complaint, plaintiffs claiming to recover under said contract; and 2d, another cause of action, setting forth a failure of the objects of the company, mentioned in the said complaint, by the default of the defendants, and praying an account and dissolution of said company, and that said contract be cancelled; one of said causes being purely a proceeding at law, and the other purely an equitable proceeding, the objects sought and the relief claimed, are wholly incompatible with each other; the plaintiffs in the one case relying upon and claiming under the contract, and in the other seeking to avoid and cancel it, thus claiming the benefit of it for themselves, and at the same time seeking to deprive the defendants of it.

Several other causes of demurrer were assigned, but the foregoing was the only one considered in this Court.

*The Court below sustained the demurrer, and plaintiffs appealed. [294]

No brief on file for appellants.

Sawyer, for Respondents.

The distinctions between legal and equitable proceedings remain unchanged, and as marked as ever. Causes legal and equitable have not been consolidated, only forms have been abolished. (Stat. Cal. 1850; Constitution, p. 30, art. vi., sec. 6; *Hays v. Vassault*, Cal Rep.; *Smith v. Rowe*, Ib.; N. Y. Code Rep. 1852, p. 18, and note, also p. 65-67, notes; *London v. Fritz*, 5 How. Pr. Rep. 188; 3 Code Rep. 165; 1 Code Rep., New Series, p. 49; 1 Ib. 393; 5 How. Rep. 219.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The District Judge sustained the demurrer, on the ground that one of the plaintiffs' propositions for relief was such as can only be sought in a court of law, and the other only in a court of chancery. In this I think he is clearly in error. Although the written contract between the parties contains a covenant for stipulated damages, yet it is by this same contract that they are constituted partners, and partners cannot sue one another at law, in respect to any of the business or undertakings of the partnership.

It can only be done in chancery, by asking a dissolution and account. In such a proceeding, if by the failure to perform covenants, damages accrue, which would be legally considered as liquidated, they could be easily adjusted by a court of equity, and no question would be left for a jury to pass upon. Or in the event the damages are held to be unliquidated, an issue would be directed out of chancery, in order to have them ascertained by a jury. It is very certain that the plaintiffs cannot sue upon this contract in any form, without seeking an account and dissolution.

Judgment reversed and remanded.

[295] *VANDYKE et al., Appellants, v. HERMAN and
BARTON, Respondents.

¹ EXECUTION, LIABILITY OF REDEMPTION.—Where land was sold at sheriff's sale, the proceeds of which did not amount to the whole judgment, leaving a balance unpaid, and was afterwards redeemed under the statute, *Held*, that the party redeeming (who was an assignee of the judgment debtor) was bound to pay the whole of the plaintiffs' judgment, and not merely his bid with interest, and 18 per cent.; and that the lien of the judgment continued till the balance was paid.

APPEAL from the Sixth Judicial District.

This case was founded on a motion for a mandamus to compel the execution of a sheriff's deed.

The facts, shown by the statement agreed upon, are as follows: On the 15th of May, 1852, Paige, Baker, and Vandusen, made their note to Vandyke for \$1500, payable in three months, with interest at the rate of three per cent. per month, and gave a mortgage to secure it on a lot in Sacramento city, recorded the same day, at 4½ o'clock P.M. On the 4th of November, 1852, Vandyke recovered judgment against said Paige, and on the 6th of December, 1852, against Baker and Vandusen, for the amount of said note. On the 10th of December, orders of sale were made, and the sheriff levied upon the said lot, and on the 3d of January, 1853, sold the same to Vandyke for \$1000. On the 15th May, 1853, Paige, Baker, and Vandusen, executed a mortgage on the same premises to Sanborn, to secure a note of \$1000, which was recorded the same day, at 5 o'clock P.M. On the 7th of December, Sanborn recovered judgment on the said note against Paige, and on the 7th of February, 1853, assigned the balance due thereon and his mortgage to Herman and Barton. On the 7th of February, Herman and Barton recovered judgment against Paige for \$615 82, with interest, etc. On the 11th of February, 1853, Herman and Barton served a notice on the sheriff that they redeemed the said lot and premises from the sale to Vandyke, by virtue of their judgment, and the Sanborn judgment and mortgage, and filed certified copies of the judg-

¹ Approved, *Mohillan v. Richards*, 9 Cal. 418; *Knight v. Fair*, Id. 118.

ment and Sanborn's mortgage with the sheriff, and an affidavit *showing the amount due on their liens, then [296] \$800 84, and paid the sheriff \$1224 25, that being the amount bid at the sale by Vandyke, with 18 per cent. thereon and interest to February 11th, 1853, the date of the redemption. The sheriff refused to make the deed to the redemptioners, who then moved the Court for a mandamus to compel him to make it.

The Court decided that the complainants were entitled to the said deed, and ordered the sheriff to execute it accordingly; and defendants appealed from the order.

Long and Burnett, for Appellants.

Herman and Barton cannot redeem without paying the whole of Vandyke's judgment, because Vandyke is "a purchaser with a lien prior to that of the redemptioners." The stat. of 1851, under which they claim the right, provides that the debtor or a redemptioner may redeem within six months after sale, on paying the purchaser the amount of his purchase, with 18 per cent. thereon, etc., "and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of the lien with interest." Vandyke was a purchaser, having a prior lien; but it is said by the plaintiffs that his lien was lost by the purchase of the lot, and they have cited cases from New York, which do not apply, for there is no statute corresponding to that cited above in New York. If a sheriff's sale extinguishes a lien for some purposes, it remains for others, and will be good for the balance of the judgment unsatisfied by it, not only against the property sold, but against any other real property which defendants in the judgment may acquire. (Stat. 1851, sec. 204; 5 Hill, 228; 1 Spe. T. Rep. 77; 4 Cow. 132; 2 Hill, 51.)

If the judgment debtor had redeemed, would not Vandyke's judgment have continued its lien for the balance? and if he could not divest the lien directly, the law will not permit him to do it indirectly, by transferring his interest to another. If he could do this, a dishonest debtor may league with another, stand by and let his property be bid off, and if it become en-

hanced in value, transfer it, and redeem, and repossess himself of it, with all improvements.

[297] *But we are "a creditor with a prior lien" under the statute. We had a lien when we purchased: the transfer did not divest it. Can the judgment debtor, by transferring his interest, get clear of paying his debt, and the rate of interest agreed upon, by tendering the amount of his bid and legal interest?

Crocker, for Respondent.

The redemption act is a remedial statute, and was intended to benefit the debtor by preventing a sacrifice of his property, and also junior judgment creditors, by permitting them to redeem. (1 Cow. 501; 2 Hill, 58.)

A sale on execution extinguishes the lien on the land sold. (8 Johns. Rep. 333; 2 Wend. 297; 7 Cow. 367 and 658.)

After a sale for less than the amount due on the judgment, creditors have a right to redeem, and the Court refused to set aside a sale on motion of the judgment creditor. (7 Cow. 367. See 8 Johns. 333; 1 Cow. 501.)

A sale extinguishes the lien of the judgment for the balance due; but if the debtor redeem, the sale becomes null and void, and the land may be resold for the balance (5 Hill, 228); and hence the debtor has the right to redeem without payment of the balance. And see 1 Barb. 388, where the sale was upon a mortgage.

Vandyke had no lien for the balance of his judgment, after the sale, on the lot sold, and was not, therefore, "a creditor having a lien." (*Vide* authorities cited above.)

Under the redemption law, a purchaser has no *title* whatever, but merely a *lien* till the time of redemption expires. (7 Cow. 540; 1 Cow. 501.)

If the judgment be large, the creditor may often sell defendant's property at a merely nominal price, and if it cannot be redeemed without payment of the whole judgment, one object of the act, the sacrifice of property by unscrupulous creditors, will be defeated.

So, where different parcels are sold at different times and prices, must the whole balance of the judgment be paid on

the redemption of either, leaving the others to be redeemed on payment of the bid only?

*How can the party coming to redeem know the [298] amount he has to pay? The balance may have been paid, compromised, released, etc., and no affidavit showing the amount due, as in other cases. (See stat. 1851, 98 sec. 234.)

The New York statutes are substantially the same with ours. (2 Hill, 54.) The respondents claim as *creditors*, not as grantees.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The sum paid to the sheriff to redeem the land was insufficient for that object. The whole amount of Vandyke's judgment, with interest, should have been paid. The language of the statute is explicit. If the interpretation insisted upon by the respondents be correct, that by the purchase of the property the lien of the creditor purchasing is gone, even for the purpose of a redemption, then the statute would have no meaning whatever.

The legal rules of construction are opposed to such a theory, and require effect to be given to statutes even of doubtful meaning.

The judgment reversed.

*HARVEY SPARKS, Respondent, v. T. D. KOHLER, [299]
and DAVID C. BRODERICK, Appellants.

¹ WITNESS, COMPETENCY OF.—A co-defendant is not a competent witness, under the 423d section of the Practice Act, upon an issue where his testimony would enure to his own benefit.

CO-DEFENDANT, WHEN COMPETENT.—He would be a competent witness to show that his co-defendant was not his partner, for this, in a legal point of view, would be against his interest.

¹ Cited, *Fairchild v. Amsbaugh*, 22 Cal. 574. Distinguished, *Geller v. Huffaker*, 1 Nev. 27. See *Johnson v. Henderson*, post 368; *Buckley v. Manife*, post 441.

IDEM, WHEN INCOMPETENT.—But to show error in the Court below, rejecting such witness for incompetency, the record should show the specific purpose for which he is offered.

IDEM, WHEN PROPERLY REJECTED.—Where such co-defendant was called generally as a witness, and he was clearly incompetent on one of the issues, *Held*, that the Court below properly rejected him.

APPEAL from the Fourth Judicial District.

The complaint stated, that the defendants, on the 3d May, 1850, by the names of T. D. Kohler & Co., for value received, made and delivered their promissory note to James Hagan, wherein they promised to pay to the said Hagan, \$3030 for cash lent; that said Hagan on the 11th December, 1851, for value received, endorsed and delivered the said promissory note to the plaintiff; that the whole of said note, principal and interest, is due and unpaid. Wherefore, plaintiff prays judgment for the said sum of \$3030 and interest.

David C. Broderick answered separately, and traversed all the allegations of said complaint, and says they are untrue; and denies that he and his co-defendant Kohler, on the 3d May, by the name of T. D. Kohler & Co., made and delivered their promissory note to James Hagan; that he is not indebted to said plaintiff in the sum of \$3030, or in any other sum, and prays to be discharged, and for judgment for costs, etc.

T. D. Kohler answered separately, and says that each and every of the allegations of said complaint are untrue; denies that he and his co-defendant Broderick, by the name of Kohler & Co., executed and delivered their promissory note to James Hagan, and denies all indebtedness to plaintiff; and further says, that the note mentioned in said complaint is not his act and deed; but that the same has been altered [300] and changed, and is a forgery*and fraud in fact and in law, and that said plaintiff and Hagan had due notice thereof, and has combined, etc., to defraud this defendant, and prays to be discharged, etc.

The cause was submitted to a jury, who found for plaintiff, \$3724 79, and judgment was entered accordingly. A motion for a new trial was made and causes assigned, which the Court overruled, and defendant appealed.

Several witnesses were called to prove the partnership, and for and against the validity of the note; which being facts for the jury, and by them passed upon without exception, it is not necessary to report. But in the course of the trial, defendants offered D. C. Broderick, to testify in behalf of his co-defendant; which the Court ruled out, and exception was taken by defendants' counsel; and at a subsequent stage of the proceeding, the "defendants offered to prove, by T. D. Kohler, that his co-defendant, D. C. Broderick, was not chargeable upon the due-bill, by showing by him that the words '& Co.' were not placed on the note by him, but had been added after making of the note, without his knowledge or consent;" to which plaintiff objected, and the Court excluded the witness. Defendants excepted.

———, for Appellants.

The Court erred in excluding T. D. Kohler when called as a witness by his co-defendant, who had a right to examine him as to the point for which he was offered, if not upon the whole case. (See Pr. Act, title XI., ch. 3, sec. 423; *Rowe v. Chandler*, Cal. Rep. 169; *Farmers' & Mechanics' Bank v. Wilburn et al.*, 1 Co. Rep., N. S., 61; 5 Howard, 296; and 1 Co. Rep., N. S., 35; *Mayor of New York*, 1 Co. Rep., N. S., 85; 5 How. 40; and 1 Cal. 61; 3 Code Rep. 177.)

Halleck, Peachy, and Billings, for Respondent.

Neither of the defendants was admissible as a witness for the other, because the testimony of one would not operate to discharge his co-defendant, without also discharging himself. Being sued on a joint contract, they could not be separated in the judgment; and though the Practice Act, section 145, provides that separate judgments may be given, the following section contemplates that this severance should only take place "whenever a *several judgment is proper." [301] In this case the suit is joint: both are liable jointly, or the whole must fail. (*Chitty Plead.* 44.)

So the Practice Act, sec. 423, p. 118, provides that the examination of one co-plaintiff for another "shall not be used in behalf of the party examined, except as against the exam-

ining party." If his testimony must necessarily be used in his own behalf as well as for his co-defendant, he must be incompetent. If the object for which Kohler was offered was true, and as testified to by him, the alteration of the note, it would render it void against both defendants. (Ohit. on Bills, 181.) He was therefore rightly excluded.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

As has been frequently determined in cases heretofore, we cannot revise the finding of the jury upon the facts.

The only question for consideration is whether the District Court erred in refusing to allow the two defendants to give evidence for each other.

Section 423 of the Practice Act declares: "A party may be examined on the part of his co-plaintiff, or co-defendant; but the examination thus taken shall not be used on behalf of the party examined, except as against the examining party."

The defendants answered separately. The issue raised by the answer of Kohler is, that the note given by him had been altered in a material part, and was therefore a forgery. This defence, if sustained by proof, would be fatal to any recovery whatever on the paper, and neither of the defendants could properly be permitted to give evidence on this point for one another, because the defence must equally avail the party giving evidence. According to the case as made, this was the only question upon which Broderick could be called to give evidence for Kohler, and it was therefore properly decided that he was incompetent.

The answer of Broderick is a general denial, amounting to the general issue at common law, and this put the plaintiff not only upon the proof of the execution of the note, but also upon the proof of the partnership, or of the authority of Kohler to involve Broderick in the same liability. It appears also from the evidence, that this was a contested question.

[302] *It sometimes happens that a witness may be competent for one purpose, and incompetent for others; and so it seems to be the case here, for although Kohler could

not be allowed to testify anything which would tend to prove that the note had been altered, yet he might very well have been permitted to show that Broderick was not his partner. Upon this question, in a legal point of view, his interest would be directly in favor of making Broderick share the liability.

But in order to show error in the refusal of the Court to let Kohler give this evidence, the record ought to show that he was proposed specifically for that purpose. As it appears, however, he was called generally as a witness, and being clearly incompetent as such, the Court below was correct in excluding him.

Judgment affirmed.

HOSTLER, Respondent, v. HAYS, Appellant.

ESTOPPEL, WHO BOUND BY.—Although it is generally true that estoppels bind only parties and privies, yet even parol admissions may be conclusive, where they have had the effect of inducing another to alter his condition.

IDEM, BY DECLARATIONS OF PARTY.—P., in possession of a vessel, appoints a master. The plaintiff (who sets up a claim to the vessel) entered into a charter-party with P., and by it acknowledges him to be owner, and H., the master appointed by P., to be master of the vessel. After the charter-party, the declared owner of the vessel became the debtor of the master, who attached the vessel for his debt. The plaintiff brought this action against the sheriff, to recover the vessel held under the attachment. *Held*, that where one permits another to deal with his property as if it belonged to the latter, and by his declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making them must be concluded.

IDEM, REPRESENTATIONS OF PARTY CONCLUSIVE.—In such cases the party is estopped, on grounds of good faith and public policy, from repudiating his own representations.

¹ **IDEM, WHEN TO BE PLEADED.**—A technical estoppel only is required to be specially pleaded, which is only by deed to the party pleading, or to one under whom he claims, or by matter of record.

APPEAL from the Superior Court of San Francisco.

The plaintiff complained that he, being the sole owner of the *barque Orion, her tackle, etc., of the [303] value of \$10,000, the defendant, (the sheriff of the

¹ Explained, *Flandreau v. Downey*, 23 Cal. 357.

county,) on the — day of —, wrongfully seized and took said barque, and unlawfully detains the same, to his damage, etc., and prays judgment for the return thereof, etc.

Defendant, answering, says that by virtue of an attachment issued out of this Court, at the suit of William H. T. Haines against Jno. Q. Powett, he, on the 25th April, 1853, attached the said barque Orion as the property of, and liable for the debt claimed to be due from, the said Powett to the said Haines; and avers that it was liable for the said debt, and that the seizure was not wrongful but legal—and prays judgment, etc.

A jury was waived, and the case was tried by the Court.

The following facts were admitted, as appears by the statement agreed upon:

That on the 31st March, 1852, plaintiff purchased the barque Orion at a marshal's sale, and paid therefor \$3150; and received the marshal's bill of sale therefor, which he now holds. That the ship's papers stand in the name of the plaintiff. That after the purchase, plaintiff agreed with one John Q. Powett, that when he would pay the cost and expenses of the vessel, with interest, and also moneys then due from Powett to plaintiff, the plaintiff would convey the vessel to Powett, and that in the meantime Powett might make use of it. That on the 27th October, the plaintiff and Powett entered into a charter-party, (marked A,) and on the 2d November, 1853, Powett appointed William H. T. Haines master of said barque, with the knowledge and consent of the plaintiff.

Plaintiff proved that the barque sailed from San Francisco on the 1st November, 1852, that said Haines was the master, appointed by Powett with the sanction of plaintiff. That three or four days after the barque sailed, the witness, at the request of plaintiff, told Haines that the plaintiff was the owner, and that Powett was not the owner; and the witness, who was the plaintiff's cashier, said further, that Powett had no money to his credit with the plaintiff since 1851.

Defendant proved by John Henderson, that in April, 1852, plaintiff put him in charge of the Orion, and paid him wages till October of the same year. In October, the plaintiff informed *witness that John Q. Powett was the

owner of the barque, and that, therefore, witness must look to Powett for his wages. That on the 1st November, 1852, witness called on plaintiff for the wages due him up to that date, and plaintiff refused to pay him, assigning for a reason that he must look to Powett, the owner of the vessel. Witness then demanded his wages of Powett, who took him to plaintiff's office, and after some conversation between plaintiff and Powett, witness was paid by plaintiff's cashier.

The cashier testified that he paid Henderson out of plaintiff's money.

Henderson further testified that he sailed the vessel on the 6th November, 1852, as mate; that she returned in April, 1853, and that plaintiff paid him off; that all the wages he had ever earned on board the vessel had been paid by plaintiff, who with his partner were consignees of the vessel.

Haines was called by defendant, (and objected to, the seizure of the vessel having been made at his suit; but admitted by the Court,) and testified that on the 5th November, 1852, Leidham (plaintiff's cashier) told him that the bill of sale and ship's papers stood in plaintiff's name; that the plaintiff had not had time to make out Powett's papers. That the vessel was attached by him for money loaned to Powett some two or three days before the vessel sailed, in November, 1852, and that he had directed the Orion to be seized under said attachment. That he had no information from any one, of the Orion being the property of the plaintiff, till after his return with her to this port, in April last; that he understood, from the remarks of Leidham, not that the vessel was the property of the plaintiff, but that it stood in his name, in consequence of the accounts between the plaintiff and Powett being unsettled through want of time.

The charter-party referred to above, is dated 27th October, 1852, made between John Q. Powett, owner of the good ship Orion, etc., now in the port of San Francisco, whereof W. H. T. Haines is master, and Hostler, Baines & Co., of, etc., charterers, etc., for a voyage to Realejo. The charterers agree to load the vessel, pay freight, etc., as specified. The cargo was consigned to Hostler and Baines, shown by bill of lading, etc.

The Court found that the seizure on the 28th April, [305] 1853, was *made by defendant at the request of W. H.

T. Haines, as the property of Powett, and that at the time of the seizure, the plaintiff was, and now is, the sole owner of the said vessel Orion, her tackle, etc., and that plaintiff is entitled to the possession of said vessel. And judgment ordered accordingly, and writ of possession. Defendant appealed.

Burnell and Gorham, for Appellant.

The respondent is estopped by his deed and his declarations, from contesting the ownership of the vessel in Powett, as against third persons, dealing with Powett in good faith, and in ignorance of the title being in the respondent. (3 Hill, 216, and cases cited; 2 Comp. 344; 15 Pick. 40.)

Botts and Emmett, for Respondent.

The estoppel raised by the appellant should have been pleaded, and not being on the record, cannot be entertained. (See 1 Saund. Plead. and Ev. 38, and cases cited.)

The property is plaintiffs. Can any dealings between Powett and a third party authorize the property of the third party to be levied upon at the suit of a creditor of Powett's? The parties are Hostler and Hays, and Hays cannot divest Hostler of his property in this issue, nor can the claim of Hays upon Powett authorize this attachment. The doctrine of estoppel applies alone to purchasers and owners, and prohibits the setting up of one title against another. But it never was extended to general creditors, so as to give them the right to attach or take in execution property thus situated. (See 3 Hill, cited above.)

An admission, to work a forfeiture, must, 1st, be inconsistent with the claim of the owner; 2d, the other party must have acted upon it; and 3d, it must appear that if disproved, the party acting upon the faith of it would be injured. (Ib. and 8 Wend. 488.) It must have been designed to influence the party acting upon it—(Ib., per NELSON, Jus.)—made with reference to the contemplated action. One man cannot have the advantage of an admission made to another. (Haine v.

Rogers, 9 Bain. & Cross.) There is in this case, that is, no more is exhibited than a *prima facie* inference of title, arising out of the transaction, but open to explanation by Hostler. If Powett were to refuse to surrender *the ves- [306] sel, having never paid a cent of the purchase-money, and Hostler were to sue him, and could show the facts admitted, would he be estopped by the charter-party? If not, is Haines his creditor in better position? Can Powett's creditors claim in that capacity what the debtor himself could not?

But the doctrine of estoppel rests upon facts, and the facts of this case have been found by the Court.

Barrett, in reply.

Hostler, in his suit, charges that Hays had taken and carried away his property; this Hays denies. How can an estoppel be pleaded to statements which are not alleged in the complaint? The acts and declarations of Hostler came out on the trial, in proof that he was the owner of the vessel in April, 1852. Hays then proved that he, long after, had ceased to be owner. Powett was bound by his acts and by the charter-party, so was Hostler: if one could not deny ownership neither could the other. Under the charter-party, Hostler could have declared against Powett, and enforced the voyage. If so, could he at the same time have claimed the ownership? And after putting Powett in possession, and acknowledging him sole owner, could Hostler set up a *secret lien*, one known only between themselves, the latter all the while in possession and controlling the property?

The property has not been admitted to be the plaintiff's, since April, 1852. The parties then settled the matter, and neither can now unsettle it for the other, nor both as regards creditors.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

There is no dispute in this case as to the material facts. The question is, whether the Court below decided the law correctly upon the facts?

The appellant's counsel relies mainly upon the doctrine of estoppel, which, it is insisted, applies to this case, because in the deed of charter-party executed by the plaintiff, he admits that the vessel is the property of Powett, and this admission came directly to the knowledge of Haines as master of the vessel, and induced him to give credit to Powett.

The sense of estoppel is, that a man, for the sake of [307] good faith *and fair dealing, ought to be estopped from saying that to be false which, by his means, has become accredited for truth, and by his representations has led others to act. (4 Kent.) Although it is generally true that estoppels bind only parties and privies, yet even parol admissions may be conclusive where they have had the effect of inducing another to alter his condition.

In this case, Haines is appointed master of the vessel by Powett, who is in possession. After that, the plaintiff enters into the charter-party, and by it acknowledges Powett to be owner and Haines to be master, and stipulates to pay Powett for the charter.

The charter describes the voyage, and was necessary for the direction of the master. The presumption necessarily arises that it was in his possession. After the execution of the charter, Powett, the declared owner, becomes the debtor of the master.

It is a general presumption that a debtor is trusted upon the faith of his property, and his possession of property is *prima facie* proof of ownership. Where, therefore, one permits another to deal with his property as if it belonged to the latter, and by his declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making them must be concluded.

This is the same case as where a man holds out to the world that a certain woman is his wife: in a suit for her debts, he will not be allowed to deny the marriage.

So if a party permits his name to be used as one of a co-partnership, he is liable to a stranger who believed him to be a partner. In all such cases, says Greenleaf, the party is estopped, on grounds of public policy and good faith, from

repudiating his own representations. (1 Greenleaf Ev., sec. 207.)

It is, however, insisted that if the charter-party is to operate as an estoppel, it ought to have been specially pleaded.

It is well settled that only a technical estoppel is required to be specially pleaded, and a technical estoppel is by deed to the party pleading, or to one under whom he claims, or by matter of record. Here the charter-party is not made to Haines or the defendant. It is only that one of the recitals in that instrument, *coming to the knowledge [308] of Haines, and presumptively inducing him to give credit to Powett, must operate by way of estoppel against the plaintiff, because in good conscience he ought not to be permitted to gainsay his admission. It is not, therefore, a technical estoppel. In the case of the Welland Canal Co. v. Hathaway, 8 Wend. 480, upon this point, Judge NELSON says: "The acts set up in this case, it is not pretended, constitute a technical estoppel, which can only be by deed or matter of record, but it is said they should operate by way of estoppel, an estoppel in *pais*. Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the Court." And to sustain this position, he cites Coke Lit., Vin. Abr., and other respectable authorities.

There is no doubt that such is the correct rule, and under the issue, made up in this case, the defence was properly admissible.

It results from this opinion, that the judgment of the Court below must be reversed, and judgment here rendered for the defendant.

Decreed accordingly.

[309] *GELSTON, Respondent, v. WHITESIDES et al.,
Appellants.

¹ INJUNCTION BOND, ACTION ON.—In an action on an injunction bond, the judgment of dissolution is conclusive, and the only question is the amount of damage sustained.

IDEM, WHAT MUST BE SHOWN.—But where an injunction is dissolved, and the suit in which it issued is dismissed by the action of the party, this is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction.

APPEAL from the Sixth Judicial District.

This action was brought against defendants, on an injunction bond. Plaintiff averred that he was lawfully seised of a certain tract of land, describing it, and engaged in cultivating it, etc. That on the 6th January, 1851, the defendants procured the injunction to be issued, restraining him from fencing, improving, etc., the said premises; and that to procure the same, the said defendants made their bond to plaintiff in the penalty of \$5000. That the injunction was set aside and dismissed, on the 9th of June, 1851, by the Court; that by reason thereof he had sustained damage, whereby he became entitled to the said penal sum of \$5000, for which he prayed judgment, etc.

The answer of defendants denies that plaintiff was the lawful owner of the premises, and avers that they had good right to the said injunction, and that the same was not dismissed by order of the Court, but by the consent and act of these defendants, and denies the damage claimed, etc.

The record, and other evidence, is voluminous in this case, but it is deemed unnecessary to report it, as the cause turned, in this Court, upon the distinction between the case of an injunction dissolved by the Court, improperly issued out, or improperly obtained, and one dismissed by the act of the parties.

In this case, the injunction was dismissed on the party's own motion. Plaintiff then commenced this action.

¹ Overruled, *Dowling v. Polack*, 18 Cal. 627.

The Court charged the jury, that the only question they had to decide was, whether any damage had been sustained by the plaintiff, by reason of the injunction; that the question of title was not for their consideration, as the issue should be narrowed *exclusively to the question in regard to the [310] legal damages, if any, proved to have been sustained by the plaintiff. But in the consideration of the question of damages, they should not regard consequential damages, but merely such as legitimately flowed from the act of issuing the injunction. Defendants excepted to the charge.

The jury found for plaintiff \$1750 damages, for which judgment was entered, and defendants appealed, the Court having denied a rehearing.

Williams, for Appellants.

The Court erred in charging that the only question for the determination of the jury was what damages plaintiff had sustained, without regard to his right to the land, or whether he had any or not; and in rejecting our evidence of title. If we had title, we had a right to issue the injunction; but the Court ruled out all evidence of title, and defendants had none; nor was it shown that the injunction was improperly or illegally issued.

Saunders, for Respondent.

The record shows that the injunction suit was dismissed by the defendants, or rather by the order and judgment of the Court, on their motion. This gave the plaintiff his right of action. The defendants did not show title or possession in Sutter, under whom they claimed; and it was shown that plaintiff was in possession since 1849, and had purchased Sutter's claim to the fifty acres in controversy; and the Court properly refused to instruct the jury in regard to defendants' title.

Plaintiff's right to action was complete, on the dismissal of the injunction suit, for he was in actual possession, claiming and holding the land as his own, and the damages are confined to the injury done to his *possession*. Suppose the defendants had an unquestionable title, the respondent was in

lawful possession, and he may have been a lessee for a term, or tenant of the holder in fee, without notice: he would, even in such case, be entitled to all the damages recovered.

The condition of an injunction bond is broken by a dissolution in part, as well as by a total dissolution. (*White v. Clay, Leigh, 68.*)

[311] *HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Damages may be recovered on an injunction bond, when the injunction has been improperly sued out; and where an injunction is dissolved, the judgment of dissolution is conclusive; and in a suit upon the bond, the only question is the amount of damages sustained. But where an injunction is dissolved, and the suit in which it issued is dismissed by the action of the party who obtained it, it is no admission that the injunction was improperly sued out. It evinces, at least, but an unwillingness further to prosecute the writ. When, in such a case, therefore, a suit is brought on the injunction bond, it is necessary, in order to maintain the action, that it should be shown that there was no proper cause for the injunction.

The Court therefore erred in instructing the jury that the issue should be narrowed exclusively to the question of damages.

The judgment is reversed, and the cause remanded.

[312] *MARY KASHAW, Appellant, v. ISRAEL KASHAW, G. T. BALDWIN, E. BARTLETT, and R. H. VANCE, Respondents.

PARTIES, WHEN WIFE MAY SUE ALONE.—The Practice Act permits the wife to sue alone, when the action is between herself and her husband. If it is necessary to introduce other parties, their introduction cannot affect her right.

HUSBAND AND WIFE, STATUTE CONSTRUED.—The object of the act is to take away the necessity of suing by *prochein ami*, and being a remedial statute, must be beneficially construed.

¹ **IDEM, DIVISION OF COMMON PROPERTY.**—Upon the dissolution of a marriage by a Court of competent jurisdiction, the act, in relation to husband and wife, directs that the common property shall be equally divided between the parties, and that the Court granting the decree shall make such order for the division thereof. *Held*, that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and one of the proper subjects of the action.

IDEM, COMMON PROPERTY, PRESUMPTIONS AS TO.—In the absence of an allegation that there is common property, the presumption would be that there was none.

IDEM, ALLEGATION OF.—And it is proper to declare, for the information of the Court, in what the common property consists, its nature, and value.

PARTIES IN ACTION FOR DIVORCE.—The wife, in a suit for divorce, may make a party of any one claiming an interest in the common property.

² **IDEM, DOMICIL.**—Where the husband had been resident of this State since 1850, and had his domicile in San Francisco, and the wife followed him and arrived here, and commenced this suit before six months had elapsed after her arrival: *Held*, that the domicile of the husband is the domicile of the wife, and that, in contemplation of law, the plaintiff must be considered as having been a resident of this State continuously from the time her husband arrived here.

APPEAL from the Fourth Judicial District.

This was a suit for a divorce.

The complaint set forth the marriage of plaintiff to defendant, on the 22d May, 1838, and produced the certificate, etc. That the relation of husband and wife has existed between them ever since, with all the duties of which she has complied, etc. That defendant has not so fulfilled his duties, etc., but has failed so to do; that the plaintiff and defendant lived peaceably together, in their said relation, in various places, and last in the city of New York, till about the 1st January, 1850; when the defendant left for California to better his condition, and promised to maintain *the [313] plaintiff suitably, etc. That he wrote her frequently after his arrival in California, informing her that he had acquired large property in San Francisco, and she believes him the owner of the property mentioned in schedule A, annexed, all of which defendant became possessed of during the continuance of the said marriage. That defendant, on the 6th February, 1851, as plaintiff is informed, disregarding his vows, etc., as husband of the plaintiff, was unlawfully united

¹ Cited, *Donovan v. Donovan*, 20 Wis. 590.

² Distinguished, *Moffat v. Moffat*, 5 Cal. 281. Approved, *Beard v. Knox*, Id. 287.

making the same, that he be charged with all the personal property of the community, and rents, etc., of the real estate received by him; that she be allowed alimony for her support since the institution of this suit, and until its final decision and partition be made. That said Baldwin, Bartlett, and Vance, be made defendants, and the fraudulent conveyances made to them be decreed to be fraudulent and void as to plaintiff; that they be decreed to account for the rents, etc., of the property conveyed, that a receiver be appointed, and for costs to plaintiff; and for further relief, etc.

A schedule of property accompanies the complaint.

The defendant, Kashaw, demurred to the bill and supplement:

1st. Because plaintiff had not legal capacity to sue.

2d. That several causes of action have been improperly united.

3d. That said complaint does not state facts sufficient to constitute a cause of action.

Defendants Baldwin and Vance also demurred, assigning the first cause above stated; 2d, defect of parties; 3d, that several causes of action were improperly joined; 4th, corresponding to the third above.

The Court, after argument on the demurrers, ordered the complaint to be dismissed, and the plaintiff appealed.

Hastings, Thomas, and Morse, for Appellant.

The plaintiff had legal capacity to sue. (Prac. Act, 1851, sec. 7.) Where the action concerns the separate property of a married woman, she may sue alone; or where the action is between herself and her husband, and the case 4 How. Pr. 232, is in point for plaintiff; and the act of 1851, p. 51, sec. 4, provides that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." And in sec. 7, second clause, "where the action is between herself and her husband, she may sue or be sued alone." (See *Coil v. Coil*, cited above, 4 How. Pr. 232.)

The wife may sue alone for an absolute divorce in [316] New York, *under the statute which gives her the right

"to sue in her own name;" the words requiring "that every action shall be prosecuted in the name of the real party in interest," in the Practice Act, are equivalent words to the above, and confer an equal right; and this especially when taken in connection with the words in sec. 7: "When the action is between her and her husband, she may sue alone." There is no difference between the two enactments in spirit or principle; and the New York case sustains this action, as brought in the name of the wife alone, without the aid of a next friend.

There is a difference as to the pecuniary relations of husband and wife in this State, and the State of New York. In the latter there is no community of property; the husband is liable for the debts of his wife; costs made by the wife must be paid by the husband. In this State there is community of property between husband and wife; she is liable for her own costs, and her own debts; and residing here, she may sue without giving security for costs, and in her own name.

Baldwin, Bartlett, and Vance, were properly made defendants. They made themselves parties after the commencement of this suit, and cannot complain that they have not the security of a next friend for the costs. (See Practice Act of 1851.) All property *acquired after* the marriage, by either husband or wife, except by gift, bequest, devise, or descent, shall be common. (Stat. 1850, p. 254, sec. 2.) This is applicable to persons married out of the State, who shall reside and acquire property therein (Ib. sec. 15); and upon the dissolution of the marriage, sec. 12 provides for its division.

The defendants Baldwin, Bartlett, and Vance, took their conveyances of defendant, and all the property claimed by plaintiff, in her first bill, after it was filed, and with full notice of the *lis pendens*. This led to the filing by plaintiff of the annexed and supplementary bill, and the charge of collusion and fraud between defendant and the said parties, made in the latter, against the rights of the plaintiff. That they were properly made parties, see the Act of 1850, p. 254, sec. 2; and Story's Eq. Plead. secs. 136, 153. As to the right of plaintiff thus to amend the bill, see Practice Act, 1851, secs. 68 and 14. The objects of *the amendment were [317]

to render the decree binding on all parties claiming an interest in the common property, to remove the cloud from the title which the conveyances from the husband to the new parties cast upon it, and to terminate litigation. And to an amendment effecting these objects, plaintiff had a right, both under the statute and by the general law.

Plaintiff was not prohibited from suing under the 3d section of the Divorce Act of 1851, requiring a residence of six months previous to suit brought.

The husband's residence is the residence of the wife: as to what constitutes a domicile, see Story's Conflict of Laws, sec. 41. A married woman follows the domicile of her husband. One who is under the power of another possesses no right to choose a domicile. The domicile of a married man is that which he himself describes, selects, or deems such, where he votes, etc., or exercises the rights of a citizen. (Ib. sec. 47.) The domicile of the wife arises from marriage. (Ib. 49.)

The word "residence" in the act must be taken to mean domicile. Bouvier's Law Dict.: "Residence, the place of one's domicile." The constitution of the State uses the word in this sense, in relation to the right of suffrage, art. 1, sec. 1. In the constitution of Kentucky, the word residence is equivalent to the word *home*. See cases of Contested Elections in Congress, p. 752; and see the act of 1850, where the word *resid-* is used in relation to the common property acquired after marriage. If plaintiff is entitled to a divorce, there is no question she is also entitled to the acquisitions made during the marriage. (Cole's Widow v. His Executors, 7 U. S. R. & S. Dig. p. 281. See 13 Ib. 42, 27; Devan v. Dixon's Exrs., 4 La. 190; 1 R. & S. Dig., sec. 24, 456.)

As to the objection that the averment in plaintiff's bill, that from the time the defendant, the husband, established himself in this State, his domicile became hers as his lawful wife, is badly pleaded, as being argumentative. The bill alleges their movings, their subsequent residence at different places, last in New York; their abandonment of their domicile there, with the intention to establish a new one in this State; and that in pursuance of that intention, he did establish [318] their domicile here in June, 1850, and *has exercised

all the rights of a citizen; acquired property, etc., with the intention of making San Francisco their permanent home; and there married another woman, with whom he is living in adulterous intercourse; all of which the demurrer admits; and if true, the averment of a conclusion of law from the facts cannot impair their force; if badly pleaded, which is not admitted, it can at most be treated as surplusage.

The Act of 1850, sec. 12, provides, "in case of the dissolution of the marriage, by decree of any Court of competent jurisdiction," for the division of the common property. This provision does not in terms give the courts jurisdiction in matters of divorce; but is it not necessarily implied in favor of the District Courts, as courts of general jurisdiction?

The case of *Harman v. Harman*, recognizes this jurisdiction under the Mexican law. Did the adoption of the common law abrogate in the State courts a branch of jurisdiction recognized in the former? We say not.

The complaint contains but one cause of action, that for a divorce: all the other matters are but the legal consequences, which flow from a decree of divorce, and as such are rightfully introduced in the same suit. They all grow out of the marital rights and injuries of the plaintiff, and are all properly to be redressed in one action. (Common Property Act of 1850, p. 250, sec. 2; *Ib.* 255, sec. 12, 15.) Alimony allowed *pendente lite*, Act of 1851, p. 187, sec. 7.

The action is not one for the recovery of either real or personal property, or of alimony or support, but of divorce, in which plaintiff has a right to a reasonable support *pendente lite*, to be paid by her husband, by order of Court. And if divorce be decreed in her favor, to a partition or division of the common property owned by them in community at the date of the institution of her suit. And so far as anything is demanded of defendants Baldwin, Bartlett, and Vance, it is that that property and its revenues, so far as it has come into their hands since, be restored to the common stock, to be divided between plaintiff and her husband.

Botts and Emmett, for Respondents.

The rule that enables a feme covert to sue, requires that

[319] she *shall sue by her next friend. (Mill's Eq. Pl. 5 notes; Miltford, Pl. 135; Cooper, 163; Wood v. Wood, 8 Wend. 357; Coit v. Coit, 4 How. Pr. 232; and 6 Ib. 53.)

But it is contended that a provision of the statutes of California dispenses with the next friend. The statute provides, sec. 7, "Where a married woman is a party, her husband shall be joined with her;" except that, 2d, When the action is between herself and her husband, she may sue and be sued *alone*. (Statute 1851, p. 52.) The rule is general; the cases excepted, special, and confined to a class. The case of Coit v. Coit, cited above, and in 6 How. Pr. 53, is an adjudication on a like statute, and the reasoning unanswerable.

The word *alone* in the act, means more than the affirmance of a general rule. She could be sued alone, and could therefore answer "in her own name." (3 Atk. 478.) But if necessary to secure the husband against the "clamor" of the wife, how much more so if third parties may be made co-defendants with him? If plaintiff fails, who is to indemnify Baldwin, Bartlett, and Vance, for their costs, etc.?

But the case is not within the exception. It is not an action between the husband and wife, but it is an action between Mary Kashaw, a married woman, and Baldwin et al., neither of whom is her husband. It is said, "they became necessary parties by their own act, and cannot complain that they have not a next friend as security for costs." They can show that this conclusion is not warranted by the facts; but they claim to be secured against the expense in the trial of this issue.

To sue for a divorce requires a residence in the plaintiff of six months.

The complaint sets forth their marriage, residence together in different places, and in New York till 1850, whence they removed to San Francisco, intending to make it their place of residence, having abandoned New York; he, for want of means to pay expenses of both, leaving her to follow him, when he could acquire and remit funds from their new home. That he arrived in San Francisco in June, 1850, and continued and had his domicil there until the institution of this suit. That from the time he established himself in this State,

it became hers, as *his lawful wife, to wit, from June, [§20] 1850. As a question of pleading this is bad: the averment of a fact must be made clearly, distinctly, and without argumentation. The Court can take nothing by inference, nor can it receive the evidence of the fact for the fact itself. The material averment of residence is nowhere made, and the Court will not search to see if that may be inferred which it was the duty of the pleader to have averred distinctly. If any fact is to be gathered from the complaint, it is that the plaintiff is not now, nor has she ever been, in this State.

Can the Court infer from the complaint that the plaintiff has been a *resident* of this State for six months before this suit was brought? The appellant says, the husband having his domicil here, the wife (though actually absent) has resided here during that time.

"Domicil" and "residence" do not mean the same thing, if the appellant is right as to the former. To be a resident of any place, one must be actually in the place: actual presence is necessary. (2 Burrill's Law Dictionary, 891.) "Resident" (2 Kent, 430, n.) and the words, "immediately preceding such application," in the act, shows this intention of the Legislature. To sustain the case, it will be necessary to decide that one may be a resident without actual presence, indeed, without ever having been in the State.

Residence cannot be made to depend upon intention.

The complaint seeks to recover from Baldwin, Bartlett, and Vance, certain specific real estate, and this claim is joined with an action for a divorce. The 64th section of the Practice Act defines what actions may be joined, and under what circumstances. The 7th subdivision of the section says, "That the causes of action so united, shall all belong to one of these classes, and *shall affect all the classes to the action.*" The defendants, Baldwin, Bartlett, and Vance, could not be affected by a decree of divorce; but they are interested in real estate, and may be affected by a decision on that question. It is therefore clear the complaint contains inconsistent causes of action, not equally affecting all the defendants; nor could they be joined under any system of equity pleading. But the statute controls the courts of

equity, as well as those of common law. (See the 64th section, cited above.)

[321] *The object of pleading is to present an issue, clear, simple, and precise, so as to show the point to be decided. The material facts must be stated, not left to inference, from the circumstances which tend to make them out; therefore, must be such as to affect all the parties and the pleadings stated, without argument or illustration. These rules are not abolished by our statutes; which, on the contrary, by abolishing technicalities, requires of the pleader greater simplicity, precision, and certainty, in presenting his case. If these principles be applied to the original and amended complaints in this case, no error will be found in the decision of the Court below.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

This was a bill filed for a divorce, and a partition of the common property. A demurrer was sustained, on the grounds:

1st. That the wife had no legal capacity to sue.

2d. That several causes of action are improperly joined.

3d. That she had not resided in the State for six months preceding the commencement of the suit, and is therefore not entitled to sue for a divorce.

Our Practice Act permits the wife to sue alone, when the action is between herself and her husband. (Laws, 520.) It is said, however, that there are other parties defendant to this action, and, therefore, it is not a suit between her and her husband only. It is a sufficient answer to this objection, that the statute does not use the word "only." The test of the wife's capacity to sue, is simply to ascertain if the suit is between her and her husband, and this being found in the affirmative, the necessity of introducing other parties cannot affect her right. The object of the act is to take away the necessity of the old form of suing by *prochein ami*, and being a remedial statute, it must be beneficially construed.

2d. The act in relation to Husband and Wife, declares that in case of the dissolution of the marriage by a court of competent jurisdiction, the common property shall be equally

divided between the parties; and the Court granting the decree, shall make such order for the division of the common property. (See *Laws, sec. 14, 5, 12.) It seems, [322] from this, to be beyond dispute, that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and consequently is necessarily one of the proper subjects of the action. How, then, can its introduction render the bill subject to the charge of multifariousness? The bill would really not be perfect without it, for the purpose of obtaining the decree of division, as contemplated by the law. All pleading is to be taken most strongly against the pleader, and in the absence of an allegation that there is common property, the presumption would be, that there was none. So it is exceedingly proper for the information of the Court, and for its proper action, to disclose specifically, if possible, in what the common property consists, its nature, and value; and as the one-half of it is equitably the right of the plaintiff, and to be so determined in this action, she may well make a party of any one claiming an interest in it, in order that she may obtain a complete determination. (See Laws, 527, sec. 13.)

3d. The act concerning Divorce (see Laws, 371) declares, "No person shall be allowed to apply for a divorce, who has not been a resident of this State for a period of six months immediately preceding such application."

In this case, it appears from the allegation of the bill, that the plaintiff's husband arrived in this State in June, 1850, with the intention of making it his home, and actually carried that intention into effect; has continued to reside here ever since, and here was the only place of his business. These facts constitute this place his domicil, and it is well settled that a married woman follows the domicil of her husband, because being under his authority, she has no right to choose one for herself.

In contemplation of law, therefore, and as affecting all legal rights and duties, the plaintiff must be considered as having been a resident of this State continuously from the time her husband arrived here, and adopted it as his home. Any other construction would often work severe injustice. Upon that

contended for by the respondent, actual, personal inhabitancy, for six months immediately preceding the action, the oldest citizen of the State might, from a temporary absence, [323] be despoiled of *most important rights. Such a result was not contemplated by the framers of the law.

Upon every ground, we are satisfied that the demurrer should have been overruled.

Judgment reversed, and cause remanded.

SELKIRK, Appellant, v. THE BOARD OF SUPERVISORS OF SACRAMENTO COUNTY, Respondents.

¹ **MANDAMUS, EFFECT OF DEMURRER.**—An application for a mandamus set forth as the ground of this application certain services and a claim for compensation, performed under the authority of an act of the Legislature, by plaintiff, and that he had submitted his account to defendants (appointed by law to audit and allow like accounts) to be audited and allowed, who had refused to act in the premises. Defendants demurred to the application, and alleged as ground that they did not see fit to allow the claim for compensation, which was a matter of discretion for them. *Held*, that the effect of the demurrer was to admit the truth of the facts alleged, and that while defendants had discretionary power to determine the amount of compensation, they cannot be permitted, in the same breath, to admit the right to compensation, and then refuse to grant it.

APPEAL from the District Court of the Sixth Judicial District.

The complaint sets forth that the plaintiff was the duly elected and qualified assessor of Sacramento County; that by the provisions of the Act of 27th March, 1850, "concerning the office of county assessor," he was entitled to such compensation per day, not exceeding \$16, as the Court of Sessions of said county might see fit to allow him, for every day the said Court should be satisfied that he was employed in the discharge of the duties required of him by law. That by the Act of 3d of May, 1852, the defendants were elected supervisors for said county, and as supervisors succeeded to all the civil powers which had belonged to the said Court of

¹ Demurrer, admission by, cited in *Tuolumne W. Co. v. Chapman*, 8 Cal. 397.

Sessions, and thereby it became their duty to audit the accounts of all officers having the disbursement of money belonging to the said county, and to examine, settle, and allow their accounts. That under the provisions of the *statute "concerning licenses," approved the 4th May, [324] 1852, it was plaintiff's duty, as assessor, to make diligent inquiry as to any party or parties who might be neglecting the requirements of the said statute, and to make report thereof to the County Treasurer. And that in obedience thereto, and by request of the Board of Supervisors next preceding the defendants in office, he did make inquiry, etc., and that from the 7th August to the 30th October, 1852, he employed fifty-four days in making such inquiries, and in reporting the same to the said County Treasurer; and that his services were of the value of \$16 per day, making in the aggregate \$864; which said sum is due and chargeable against the said county. The plaintiff exhibited his account for said services to defendants, and prayed that the same might be audited and allowed to him, which it was their duty to audit and allow; but the defendants denied, and still deny, the right of plaintiff to receive any compensation for his said services, and refuse to allow any, etc., and pray for a mandamus to compel them to audit and allow his said account, etc.

The Court ordered the mandamus to issue, commanding the defendants to audit, etc., the account, or show cause why they do not, etc.

The defendants demurred to the application, on the ground that it appears from the said complaint that defendants were not satisfied that the number of days charged by plaintiff were actually employed by him in the said service; and that said Board did not see fit to allow him \$16 per day, and because the amount of compensation per diem of \$16 is entirely discretionary with the Board.

The Court denied the petition, and gave judgment against plaintiff for costs. Plaintiff appealed.

Edwards and Coward, for Appellant.

The demurrer admits all the facts averred in the complaint: that plaintiff was assessor; that he employed fifty-four days

in the service as charged, in obedience to law, and at the request of defendants' predecessors, worth \$16 per day; that plaintiff exhibited his account, and defendants refused to allow or audit it. Neither the fact nor the value of the services are denied; but compensation, and the right thereto, are denied.

[325] *The Court had no discretion but in ascertaining the number of days employed, and in determining the value of the services ascertained: they had no discretion wholly to refuse compensation, and this not *absolute* but *legal*. The demurrer not only *speaks*, but flatly denies the record: the complaint shows no state of facts like that assumed in the demurrer. It avers that the services had been rendered, and the record presents no denial. This could only have been counteracted by answer.

But defendants *did not see fit* to allow \$16 per day, nor any other sum whatever. They refused to exercise the legal discretion confided to them. If they had allowed reasonable compensation, less than the \$16 per day, their action would have been final; but they refused the entire claim, though the duty was expressly enjoined by law. Shall this conclude the plaintiff?

The questions for the Board, were, Did the plaintiff perform the services? and if so, What would be reasonable compensation? The law directed the services, and that the county should compensate them, and the discretion of the Board was limited to the quantum of services rendered, and the reasonableness of the compensation; but they transcended their legal discretion in denying all compensation. They refused to act where the law expressly enjoined action.

The demurrer admits the services and their value as averred, and that they were rendered in conformity to the requirements of law, and at the express request of the defendant's predecessors; and the only plain, speedy, and adequate remedy for plaintiff was by mandamus, which was denied. The Court was not called upon to control the discretion of the respondents in fixing the compensation, but to compel them to fix *some* compensation. (12 Johns. 414; 18 Johns. 242; 19 Johns. 260.)

Coulter, for Respondents.

Where an act is sought to be compelled by mandamus, which rests in the discretion of the tribunal or officer sought to be compelled, the writ cannot issue. (*Mowbray v. Madison*, 1 Cranch Rep.)

In the absence of other testimony, it must be presumed by this Court, that defendants' refusal to audit and allow appellant's *account, was based upon their not being [326] satisfied that the services charged had been performed. Under the discretionary power conferred upon them, it must be presumed the defendants acted as legally they might, nothing appearing to the contrary.

The counsel then examined the cases cited by appellants, and distinguished them from the case at bar, and proceeded to say, that if, in this case, the complaint *speaks* at all, it says that the Board refused to audit and allow any part of the appellant's account, and the presumption arises that that refusal was based upon the ground that there was no evidence to satisfy them that the services charged, or any part of them, had ever been rendered. The record assigns no reason, and without this, the Court will presume they acted in good faith, and within the powers of their office; and quoted the opinion of PLATT, Justice, in the last case cited above, etc.

The words in the statute, "for each day the Court *shall be satisfied* they shall have been respectively employed," imply the power of refusal, and enjoins its exercise, unless satisfied as to the correctness and justness of the account before them. If this discretionary power exists but in part, the applicant for a mandamus was bound to show a ground that would take the case out of it; and this he has not done, but has merely set out the refusal of defendants to audit, etc.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

One of the effects of the demurrer is to admit the truth of the facts alleged.

While, therefore, it is conceded that the supervisors have discretionary power to allow the claim, and determine the

amount of compensation, they cannot be permitted in the same breath, to admit the right to compensation, and then refuse to grant it.

The demurrer should therefore be overruled, and the respondents required to answer, in order that the District Court may determine whether they had exercised the jurisdiction with which the law invests them, and have heard and determined the claim of the petitioner according to their legal discretion.

Judgment reversed.

[327] *BARNETT and RICHEY, Respondents, v. KILBOURNE, Appellant.

RES ADJUDICATA, DISMISSAL OF ACTION.—Where a bill disclosed that the same subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed.

EQUITY, GROUND FOR RELIEF, INSUFFICIENT ALLEGATIONS.—The allegations of ignorance in making the necessary averments, or of insufficient conduct, in the prosecution of a former suit, does not constitute ground for relief in Chancery.

APPEAL from the Seventh Judicial District.

The opinion of the Court discloses the facts upon which the bill was ordered to be dismissed.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The demurrer in this suit ought to have been sustained. The bill seems to be only an application for a new trial. It shows upon its face that the same subject-matter had been litigated between the same parties in a prior suit, and that in said suit the plaintiff in this suit had set up in defence the equity which he claims by his present bill. The allegation of ignorance in making the necessary averments, or of insufficient conduct in the prosecution of the first suit, do not constitute grounds for relief in Chancery.

The judgment is reversed, and the bill dismissed.

***CARRIER, Appellant, v. BRANNAN, Respondent. [328]**

¹ **GAMING DEBT NOT RECOVERABLE.**—No action will lie to recover money lost at gaming.

IDEM, NOT LEGALIZED BY LICENSE ACT.—Gaming debts have not been legalized by the operation of the act of the Legislature licensing gaming houses.

IDEM, OBJECT OF ACT.—The object of the Legislature in passing the act was to control gaming within certain bounds, by imposing restrictions and burdens upon persons carrying on this kind of business.

IDEM, EFFECT OF ACT.—The license simply operates as a permission, and removes the misdemeanor at common law, without changing the character of the contract.

APPEAL from the Superior Court of San Francisco.

This was an action brought to recover \$17,000 and interest. The complaint contained a count for money lent and advanced by said plaintiff and one William Thompson and Gustave Martell to said defendant; another for money lost by said defendant, and won by said plaintiff, Thompson, and Martell, at a game called faro, and which defendant then and there promised to pay, and which said sums of money so owing have by the said Thompson and Martell been transferred to the plaintiff.

The defendant demurred to the complaint. The second count was the only one considered in the Court below; and as to this, the cause of demurrer assigned was "that the debt set forth in said count was upon a consideration void in law, and does not constitute a legal cause of action against the defendant to be enforced in this Court, and that this Court has no jurisdiction of the subject of the action as set forth in said count." And defendant further says "that the said debt as therein set forth could not be assigned by the parties therein named to the plaintiff, whereby he could maintain an action in his own name for the recovery thereof."

The Court sustained the demurrer, and gave judgment for defendant for costs, etc. Plaintiff appealed.

Lockwood, for Appellant,

Contended that such wager is not illegal at common law,

¹ Approved, *Scott v. Courtney*, 7 Nev. 422.

and so far from being prohibited by statute, it is [329] tacitly *recognized and allowed by the acts imposing a tax on such games, and urged that the case of *Bryant v. Mead*, 1 Cal., was not law, and cited 3 Durnford & E. 693; 3 Eng. Law & Eq. 39; 5 Burrow, 2802; 2 Chit. Plead. 234; 4 Black. Com. 177.

MURRAY, Chief Justice, delivered the opinion of the Court. HEIDENFELD, Justice, concurred.

The plaintiff brought suit for the recovery of money lost at play in a common gaming-house.

This Court decided, in the case of *Bryant v. Mead*, 1 Cal. 441, that no action would lie at common law to recover debts of this character. This has ever since been regarded as the settled law of the State upon this subject, and we feel no disposition to disturb or question the propriety of that decision. It needs no authority or arguments to satisfy this Court that the practice of gaming is vicious and immoral in its nature, and ruinous to the harmony and well-being of society. Neither do we think that gaming debts have been legalized by the operation of the act of the Legislature licensing gaming-houses.

The Legislature, finding a thirst for play so universally prevalent throughout the State, and despairing of suppressing it entirely, have attempted to control it within certain bounds, by imposing restrictions and burdens upon persons carrying on this kind of business. The license simply operates as a permission, and removes or does away with the misdemeanor which existed at common law, without changing the character of the contract.

To believe that the Legislature had any other intention in the passage of this act, would be as unjust to them as it would be humiliating to the Courts to enforce it.

Judgment affirmed.

[The case of *Davis*, appellant, *v. Goodman et al.*, was decided at this term, and as it came within the rule laid down in the preceding case, no further report of it is deemed necessary.]

***LAMBERT, Respondent, v. SLADE & LAMBERT, [330]
Appellants.**

PLEADING, INSUFFICIENT AVERMENTS.—The declaration was for money loaned, and set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, and that he did pay the same; but did not aver that after paying the draft, he cancelled it, and delivered it up to the defendant. *Held*, that the defects were fatal in this form of action.

APPEAL from the Superior Court of San Francisco.

The declaration in this case was as follows:

“CITY AND COUNTY OF }
SAN FRANCISCO, } ss.

“The above named plaintiff, complaining against the above named defendants, avers, that in or about the month of February, 1852, the defendants were doing business under the style and firm of Slade, Lambert & Co., in this city, and as such firm, they did in said month draw their draft in writing on the firm of A. A. Lawrence & Co., of Boston, in the State of Massachusetts, one day after sight, for the sum of \$2500, and the plaintiff avers that said draft was drawn on said firm of A. A. Lawrence & Co., with the understanding that said plaintiff should pay the same; and the plaintiff avers that he did pay the said \$2500 on said draft, which said sum the defendants received as a loan from this plaintiff. And the plaintiff avers that said defendants, although often requested, refused and still refuse to pay the same or any part thereof, and the same now remains due with interest. The plaintiff therefore demands judgment for said sum of \$2500, and interest, besides costs of suit.”

A judgment was entered for plaintiff in the suit, from which defendants appealed.

Brooks, Martin, and McCracken, for Appellants.

The complaint does not set forth sufficient facts to show a cause of action. It does not aver a promise of defendants; nor a transfer of the draft; nor a protest nor acceptance *supra* protest. The defendants would not be protected from

a suit in favor of A. A. Lawrence, nor this be a bar to an action for the same cause.

[331] *Cooke, for Respondent, insisted that the proceedings were regular.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred:

The declaration cannot maintain the judgment.

The count is for money loaned, but the recital of facts which it contains shows that the plaintiff for the money advanced became the purchaser of the draft, and for aught that appears to the contrary, is still the holder of it. The suit should therefore have been upon the draft, which, it seems, is yet an outstanding liability of the defendants. The plaintiff, in order to recover in the present form of his action, must allege and prove that after paying the draft, he cancelled it, and delivered it up to the defendants. Without this, the declaration is fatally defective.

Judgment reversed, and cause remanded.

A petition was presented to the Court for a rehearing in this case, and it was ordered, December 13, 1853, "that all proceedings be stayed until the same can be heard and determined on."

[332] *GREGORY, Appellant, v. HAY, Respondent.

INJUNCTION, WHAT MUST BE SHOWN.—Where the petition set forth a lease and contract to pay rent in *kind*, by defendant to plaintiff, and that defendant had refused payment of the rent, and was removing the crop with intent to defraud plaintiff of his share due for rent, and asked for an injunction to restrain him: *Held*, that in this case, it was necessary, to obtain an injunction, for the bill to aver, either the insolvency of the defendant, or that he was without tangible property which could be made the subject of attachment or execution; and the bill being defective in both particulars, the order for an injunction could not be sustained.

APPEAL from the District Court of the ——— District, County of Santa Cruz.

This was an application for an injunction.

The complaint set forth that the plaintiff was the assignee of a lease, executed between the defendant and a previous lessor, for sixty acres of land, for the term of three years, which, by several assignments, became vested in him, with the right to receive the rents reserved, etc., which rents were payable in kind; that defendant had raised a large crop of potatoes on the demised premises, 210 bushels to the acre, which he is now gathering, one-fourth of which is payable to plaintiff as rent by the said lease; and that he, the defendant, has refused to pay or deliver the portion thereof due to the plaintiff as aforesaid, for rent, and, for the purpose of defrauding the plaintiff, has sold and sent to foreign parts a large portion of said crop, without delivering to plaintiff the fourth part thereof, as he was bound to do by his said contract; and that he is yet engaged in gathering and disposing of the same as aforesaid, in violation of his lease. That the fourth part of the crop so raised, for which rent is due, will amount to about 3000 bushels, and the present value of potatoes in the market is \$2 50 per bushel, which plaintiff is about to lose by defendant's refusal to deliver the same, and by his fraudulent removal of them without payment of rent to plaintiff, and prays for an injunction to restrain the defendant from removing and disposing of the potatoes, and for a receiver to take charge of and sell them and account, etc.

*The Court granted the injunction, and appointed a [333] receiver until further order thereon, and afterwards, upon the demurrer of defendant and divers causes filed by him, the injunction was dissolved, and plaintiff appealed from the order directing the dissolution.

J. Wilson, for Appellant.

There is no answer filed by defendant, and of course the intention to defraud the plaintiff is admitted. If there were good causes of demurrer, an answer should have been put in denying the fraud. (See *Daniel's Ch. Pr.* 375, 653; 9 *Ves.* 87; *Mitford E. Pl.* 216, note f; 3 *Paige*, 277 and 273; *Story Eq. Plead.* 464-5, and sec. 605.) Charges of fraud shut out

a demurrer. (1 Dan. Ch. 375; Ib. 653.) If the demurrer is not to the whole bill, it ought to specify which part, and if it does not, it is not good, and must be overruled. (2 Paige, 574; Ib. 414; 6 Ib. 57; 1 Johns. Ch. 57.) Demurrer bad in part is bad in the whole.

The injunction was properly granted on the allegation of the petition, that the rents were due, demanded, and refused, with a view to defraud plaintiff, and where this stands admitted by the pleadings, it is good cause for granting an injunction. A motion to dissolve without answer, admits every allegation with their legal conclusions. The motion to dissolve was improperly sustained. (2 Sto. Eq. Pl. 168, secs. 845, 710, 711, 717, 718, 721, and 722.)

Sloan, for Respondent.

When the bill was filed, defendant was in the act of gathering his crop. It does not show how much had been gathered, how much in the ground, or that defendant was irresponsible. There was no existing cause of action, as is apparent from the terms of the lease, when the suit was brought. The demand for rent was premature; no *petitiam affectionis*, as to the potatoes, is shown to exist; no insolvency on the part of the defendant, or other probable cause of loss, or irreparable injury to the appellant.

HEYDENFELDT, Justice, delivered the opinion of the Court.
WELLS, Justice, concurred.

[334] *To obtain the injunction in this case, it was necessary for the bill of complaint to aver either the insolvency of the defendant, or that he is without any tangible property which could be made the subject of attachment or execution. Without either of these averments, the bill is too defective to sustain the order for an injunction and receiver.

The order of dissolution is affirmed, and the cause remanded for further proceedings.

**GASKILL, Appellant, v. TRAINER, MOOR, et al.,
Respondents.**

LIEN ON LEASEHOLD INTEREST.—Where a lien attaches upon a leasehold interest, it so attaches, subject to all the conditions of the lease.

¹ **LEASE, DEMAND FOR RENT NECESSARY TO CREATE FORFEITURE.**—But if one of the conditions be forfeiture for non-payment of rent, the mere failure to pay the rent will not make a forfeiture: there must be a formal demand made on the day it becomes due, to effect this.

IDEM, WAIVER OF DEMAND NOT IMPLIED.—A waiver of the demand will never be implied for the purpose of making a forfeiture; for, from its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law.

IDEM, SURRENDER OF LEASEHOLD INTEREST.—The surrender of a leasehold estate operates a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect.

LIEN ON LEASEHOLD INTEREST, ENFORCEMENT OF.—The party holding a lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent, and a surrender of the lease to the lessor.

APPEAL from the Fourth Judicial District.

The complaint sets forth, that on the 21st May, 1852, the plaintiff, and defendant, Trainer, entered into a written agreement, whereby the plaintiff contracted to furnish materials, and to do the brickwork of a house, to be erected by defendant, on a lot, on the corner of Front Street, in San Francisco, of which said defendant was then lessee; the defendant, by the terms of the contract, agreed to pay the plaintiff, for the materials and work to be furnished and executed, \$6600, as the work *progressed, as set forth in the complaint; [335] and plaintiff alleges full performance on his part, and failure on the part of defendant.

Plaintiff further claims \$215, for extra work and materials.

And further alleges, that on the 28th June, 1852, he filed notice of his intention to hold a lien upon the said building, for the amount due and to become due, in pursuance of the statute, and prays judgment for \$5043, with interest on \$1829, at the rate of ten per cent. per annum, and on \$3224, at the rate of three per cent. per month.

And asks that all the right, etc., that the defendant,

¹ Cited, *Chipman v. Emerio*, ante 283; *McGlynn v. Moore*, 25 Cal. 397; *Gage v. Bates*, 40 Cal. 385; *Lander v. Miles*, 3 Or. 43. See *O'Connor v. Kelly*, 41 Cal. 434.

Trainer, had in the said lot, at the time of the commencement of the said building, may be sold, and that out of the proceeds thereof the sum of \$3715 75, with interest, be paid to plaintiff, and the remainder be held by the Court, subject to its future order; and prays that Moor and others [naming them] be summoned to answer in this suit, if any interest they have therein.

On the 21st May, Trainer, defendant, answered and denied that he ever was owner of the said lot or building; that he paid the plaintiff all moneys due on the contract, up to the 2d June, 1852, and that all materials furnished, work done, etc., since that date, were for defendant, Moor, the owner of the said building, of which defendant had notice, and well knew. That the plaintiff was a sub-contractor of this defendant, who contracted with Moor, the owner of the lot, and denies the execution of the written agreement stated in the complaint; and each and every allegation of plaintiff's complaint.

On the 21st September, Moor answered, that defendant, Trainer, was not the owner of the lot, and says that plaintiff was sub-contractor, as stated by Trainer, with whom this defendant contracted, and denies all the allegations of the complaint.

The only witness called in the case was the defendant, Trainer, called by the plaintiff, who testified that on the 10th May, 1852, he leased the premises of defendant, Moor, by an indenture of lease (in evidence); that on the 21st May, he contracted with the plaintiff for the brickwork of a building, etc. (contract in evidence); that the plaintiff fully and faithfully complied with all his undertakings and agreements in said contract; and that there remained due thereon [336] \$1715, with interest at the rate of *ten per cent. from the 26th June, 1852, and \$2600, with interest at the rate of three per cent. per month, from the same day.

The defendant, Moor, then offered to prove by the witness that on the 3d June, 1852, when plaintiff had nearly completed his contract, the defendants, Moor and Trainer, had cancelled the lease from Moor to Trainer. Plaintiff objected. The Court admitted the testimony, and defendant excepted. The

witness then stated that during the erection of the building, he found himself unable to fulfil his contract with the plaintiff, and offered to assign him his lease, which plaintiff declined, and insisted on the contract; and when the plaintiff was pressing him very hard for money, he saw Moor, and told him he could not fulfil his engagement with him; and thereupon "he and Moor signed their names under the words written across the face of the first page of the said lease (marked C,) and duly executed and delivered the same, and entered into the further contract (marked D.) This was on the 3d June, 1852. After this, witness remained in possession of the premises, for the purpose of completing the building for Moor, as contractor, and not as a tenant. He informed plaintiff of the arrangement made with Moor, stating that it would enable him to pay the plaintiff in a few days all that was due him, as well as the future payments as they became due." The witness then stated some payments made by him, and other matters not material, and proceeded to say, that when the building was nearly completed, he (Trainer) surrendered the possession to Moor, who had been in possession ever since. That he had never paid Moor any rent.

The exhibits referred to do not accompany the record.

The Court, to whom the case was submitted without a jury, found the contract as laid in the complaint, and full performance on the part of the plaintiff; also, the filing of the mechanic's lien, and that defendant, Trainer, was indebted to the plaintiff, etc.

That at the time of the commencement of the work, and furnishing the materials, etc., Trainer was *seised* of an estate in the premises, under the lease from Moor, for the term of five years, paying the monthly rent therefor of \$300, the first payment to be made on the 6th June, 1852. That in default of the *payment of the rent for five days after [337] it became due and payable, Moor had the right to enter upon and repossess the said premises, as of his own right. That as a further condition of said lease, the said Trainer, within two months from the said 10th of June, was to commence to erect a house (describing it) upon some part of the premises, and expend not less than \$10,000.

That on the 3d of June, Trainer, unable to perform the covenants, applied to Moor to be discharged from the same, and that the said Trainer and Moor did, on that day, enter into an agreement, whereby the said Moor was to, and did, reënter and repossess himself of the said premises, and discharged and released the said Trainer by verbal agreement, and by a writing not under seal, written across the face of said lease, from the performance of all the conditions therein contained. That such surrender on the part of Trainer, and reëntry by said Moor, were made in good faith, and without any intention to defraud the plaintiff. That the reëntry was made prior to the 6th June, when the first month's rent would have become due, and that on and after the 10th June, the said Moor was in possession under the above-mentioned agreement, and is now in possession, no part of the rent reserved having been paid. That the agreement to cancel, and the reëntry by Moor, were made with full knowledge of the plaintiff, who went on and furnished materials, and performed work, knowing that the building was to be completed by Trainer, and paid for by Moor, as stipulated in the mortgage.

The Court found the conclusions of law as follows:

That the plaintiff is entitled to recover of the defendant, Trainer, \$5053, with interest on \$1829, at the rate of 10 per cent. per annum, and on \$3224, at 3 per cent. per month.

That the reëntry of Moor prior to the day the rent became due, under the said agreement, and his possession on the day the rent became due, and subsequent thereto, the rent not being paid nor tendered, was a termination of the tenancy of the said Trainer, under the said lease, and reinstated Moor in the estate, free from all incumbrances created or charged on the leasehold estate by Trainer; and that the plaintiff has no lien on the said premises, for the materials found and [338] labor performed, under his *agreement with Trainer; and ordered judgment for defendant, Moor, but without costs. Plaintiff appealed.

There is no brief on file for appellant.

Crockett and Baker, for Respondents.

Gaskill's lien attached only on Trainer's leasehold interest.

This leasehold was subject to two conditions, payment of rent monthly, in advance, and that the lessee should immediately proceed to expend \$10,000 on the premises, in the erection of buildings. Trainer could not comply, and delivered up the premises to Moor, who holds them, and his lease stipulates that he may do so.

It is contended for appellant, that writing the words "cancelled and discharged," across the face of the lease, would not destroy its contents. If so, the rights of the parties continue as if these words had never been written. The lease provides that Moor may terminate the tenancy, if the rent is not paid. He is in possession, and there is a failure to pay: he elected to terminate the lease, why may he not do so? But it is said he did not enter on the *ground of forfeiture*. He was in possession when the rent became due, and could not reënter upon his own possession. His election to terminate the tenancy in this condition of things was a right, and he exercised it.

But it is claimed for plaintiff that Moor had no right to reënter, without a formal demand of rent, on the premises, on the day it became due. But if this rule be in force here, the tenant may waive the demand, and Trainer did this, by confessing his inability to pay, and delivering possession to Moor. But in this State no demand is necessary. By the statute of 1850, sec. 13, p. 150, holding over after the expiration of the lease, or contrary to the conditions or covenants of the lease, or after rent is due and payable, for three days after demand of the possession, the lessee can recover possession by action for unlawful detainer. We therefore say no demand at common law is necessary. It is sufficient if rent be due, and demand be made of the possession in writing; and we cite the statute to show that the common law is altered by it, and to show that without a clause in the lease, we had the right to reënter for non-payment of rent, on demand *of possession as above. But the tenant [339] has waived the necessity for the demand, by admitting his inability to pay, and surrendering the possession.

Such would be the case, if the words "cancelled and discharged," on the face, were a nullity, as is contended for.

Are not these words as effective as if the parties had written, "We hereby agree that this lease is cancelled, and we mutually discharge each other from the covenants thereof?" and this is what they necessarily import. The intention is clear, and this is what the law regards. (Sugden on Vendors, 160 *et seq.*) Any form of words will operate a surrender, which plainly indicates the intention of the parties.

But it is said Trainer had not the power to terminate his estate as against Gaskill, because his lien had attached in the meantime. The lease was at an end between Trainer and Moor. Gaskill's lien was only upon Trainer's right to enjoy the property during the term, subject to its conditions imposed on Trainer by the lease, and that neither Trainer nor Gaskill complied with, or offered to comply with. If Gaskill claimed to be substituted to Trainer's rights, he would take them *cum onere*, and he would be bound to pay the rent and build the house; but he did neither, nor offered to do either. He is estopped on the same principle that the owner of a lot who tacitly permits it to be sold to an innocent purchaser, without giving notice of his claim, is estopped from asserting it.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The first proposition of the respondent is correctly stated, that Gaskill's lien attached only on Trainer's leasehold interest, subject to all the conditions of the lease from Moor to Trainer.

From this it is attempted to be deduced, that as by the terms of the lease, it was to be forfeited upon non-payment of rent, the failure of the lessee to pay destroyed the lien of the plaintiff.

This would be only true if there had been a technical forfeiture. The failure to pay cannot alone create one. There was an equal necessity that a formal demand for the [340] rent should *have been made on the day it became due. Nor for the purpose of forfeiture will a waiver of the demand ever be implied, because a forfeiture, from

its very nature, cannot take place by consent, and it is not favored by the rules of law.

Having declined to take the legal steps to produce the forfeiture, Moor, it is said, received the leasehold estate by surrender, and that consequently the right of all parties derived under the lease were determined with it. Such a rule would be fraught with hardship and inconvenience, and has no legal sanction. If he took by surrender, the estate must nevertheless be subject to the burdens with which it was invested at the time; for although by the surrender, the leasehold estate is merged in the fee, yet this principle of merger, which arose out of the fondness of the law for convenience and symmetry, was never designed to defeat the rights of a third party, which had intervened before the merger took effect.

It is unnecessary to decide whether the words "cancelled and discharged," written across the lease, have the legal effect of creating a surrender or not, because in either event, from the views here taken, the right of the plaintiff to the enforcement of his lien is upheld.

Judgment reversed, and cause remanded.

***HENLY and HASTINGS, Respondents, v. L. W. [341]
HASTINGS, Appellant.**

COURTS, AUTHORITY WRONGFULLY EXERCISED.—It was a wrongful exercise of authority in the District Court to strike out, on an *ex parte* motion, a marginal entry of satisfaction on a judgment rendered two years before.

¹ **APPEAL FROM ORDER, WHEN WILL NOT LIE.**—An appeal will not lie from an order of Court, refusing to set aside a former order. Such order is merely negative, a refusal to disturb the first decision. It is *that*, the former decision, which is the subject of complaint, and not the refusal to alter it.

APPEAL from the Sixth Judicial District.

The record in this case shows, that on the 6th July, 1850, judgment was rendered by confession in favor of plaintiffs,

¹ Explained, *Gilman v. Contra.*

against defendant for \$9500. On this judgment execution issued, which was returned with satisfaction thereof endorsed and signed by plaintiffs, as received of Chevor, one of defendants (except the costs not paid.) This endorsement of satisfaction was upon the return of the execution, entered upon the margin of the judgment. The endorsement is dated October 1st, 1851, and the return was made to the clerk's office, October 12th, 1850. On the 14th day of February, 1853, on motion of the attorney of the plaintiffs, it was ordered by the Court that the marginal entry of satisfaction be stricken out, and that the judgment remain in full force, and valid as between the defendants. This motion and order were made *ex parte*, and without notice to defendants.

On the 26th May, 1853, L. W. Hastings, one of the defendants, moved the Court to set aside the order of 14th February, 1853, striking out the marginal entry of satisfaction, which the Court overruled; and it was from the judgment or order of the Court overruling this motion, that this appeal is taken by L. W. Hastings, to this Court.

Burril and Goss, for Appellant.

The order should not have been made *ex parte*. A judgment without notice is void. (1 Howard, 351; *Ib.* 521.) [342] The counsel's *argument was confined to the order of the Court of 14th February, and was to the order appealed from, refusing to set aside that order.

No brief for respondent on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

In February, 1853, the District Court on an *ex parte* motion, ordered to be stricken out, a marginal entry of satisfaction of a judgment, which had been rendered two years before. This was a wrongful exercise of authority, and is a proper subject for the reviewing power of this Court.

But the defendants do not appeal from that order. They make a motion to set aside that order, and then appeal from the refusal to grant their motion. This is certainly not reversible: it is the mere negative action of the Court declining

to disturb its first decision. It is that decision which is the proper subject of complaint, and the refusal to alter it, any number of times, would not make it less so. There must be observed in appeals to this Court, the order and regularity which belong to well-established principles founded in sound reason.

The appeal is dismissed.

***JOHNSON, Respondent, v. TOTTEN and KEL- [343]
LOGG, Appellants.**

PARTNERSHIP, CONTINUANCE OF.—A consignment of merchandise was made to defendants as partners. After the dissolution of the partnership, two sales of a portion of the merchandise were made—one by each partner, who severally received the money: *Held*, that the partnership continued for the purpose of fulfilling engagements; and that the defendants were jointly liable.

¹ **NOTICE OF DISSOLUTION NECESSARY.**—To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him.

CONSIGNEE, LIABILITY FOR MONEY HAD AND RECEIVED.—In an action for money had and received by the consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered.

IDEM, FOR PROCEEDS OF SALE BY.—Such sale must be taken, in reference to the rights of the plaintiff, to have been made for cash; and to the vendor belongs the demand created by the sale against the vendee; and the vendor is liable to the plaintiff for money had and received.

APPEAL from the District Court of the Fourth Judicial District.

This was an action for money had and received by defendants as copartners in trade for the use of the plaintiff, being the proceeds of goods sold by defendants on consignment from plaintiff. The suit was commenced May 31st, 1852. One of the defendants, Totten, made default; the other, Kellogg, answered. The case was referred to C. T. Emmett, as a sole referee, to try all issues and report a judgment in the case.

There was proof of several consignments by several ves-

¹ Cited, *Williams v. Bowers*, 15 Cal. 321.

of any other state of facts must be pleaded specially, and no recovery can be had in this form of action.

The referee erred in allowing the amount of the goods sold on credit, under the pleadings in the case. If defendants were liable for a disobedience of orders, or neglect of duty, an action on the case, with an averment of consideration, was the remedy, and not assumpsit for money had and received.

Defendants were partners on the sales made at half profits.

———, for Respondent.

The sales on half profits did not create a partnership, but was a mode of ascertaining the compensation of de-
[346] fendants. (2 H. *Black, 590; Sts. on Part. sec. 32 and note; secs. 36 and 43; 1 Stor. R. 371.)

There is no valid objection to the form of the action. (Paley on Agency, by Dunlap, 53 and note.) If erroneous, defendants should have demurred specially; after pleading, it is too late.

As copartners, the act of one was the act of both, and money received by one is received by both. (Collyer, sec. 422; 3 Nel. 114; *Godfrey v. Sanders*.)

The dissolution of the firm could not affect the rights of plaintiff until notice was brought home to him. The plaintiff arrived in San Francisco, in May, 1852, and then first received notice of the dissolution. *Quoad*, the plaintiff, the partnership continued down to the term of his arrival, and to this time the acts of either were the acts of both. (*National Bank v. Norton*, 1 Hill, 572.)

After the dissolution, the proceeds of all the sales went into the hands of Kellogg, who appealed on the ground that Totten, who had made default, was not liable. The plaintiff could have held Kellogg alone.

The merchandise from the Hurricane was consigned before, but arrived after, the dissolution, though before notice to plaintiff. Defendants jointly received, and jointly made sale of it, and divided the commission: they are, therefore, jointly liable; for the dissolution was inoperative without notice; and here was a joint undertaking, and, therefore, a joint liability.

(Paley's Agency, by Dunlap, 52; *Waugh v. Barber*, 2 H. Bl. 235.)

The goods sold to Cheesboro were properly included in the recovery: the referee found that defendants received money or money's worth; they charged 2 per cent. per month, and, therefore, took a note, which, not having been produced, must have been paid. (1 Doug. 137, 138.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The respondent urges that two sales, and receipts therefrom of money were made after the dissolution of the partnership, one by each partner, and that they were therefore not jointly liable. I am satisfied that notwithstanding the dissolution of the *partnership, yet for the purpose of fulfilling engagements made during its existence, it had a limited existence legally, and subsisted for such purpose, even after the act of dissolution by the parties. (See Collyer on Part. 118.)

Independent of this position, it is positively shown that the plaintiff had no notice of the dissolution, which was absolutely necessary in order to change the character of the defendants' liability. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. It is true that notice may be implied from circumstances, but in this case, it is shown positively that although the defendants took every necessary step to give the notice, yet it was impossible that the plaintiff could have received it.

Another objection is that the amount of a sale made on credit is charged to the defendants, which could not be done in this form of action, because if they had no right to sell on credit, they would only be liable for unskilful management, and not for money had and received.

We have arrived at a different conclusion. If the defendants had no right to sell on credit, as appears from the evidence, having the right to sell, the sale must be taken in reference to the rights of the plaintiff as having been for cash. To the defendants belong the demand which the sale

created against their vendee, and they are liable to the plaintiff as for money had and received.

Judgment affirmed.

[348] *FITCH, Appellant, v. BROCKMON, Sheriff, Respondent.

CONTRACT, CONSTRUCTION OF.—M. B. C. contracted with the owner of a ranch to take the ranch under his charge, and take care of it to the best of his ability, etc., and the owner stipulated in recompense of his services, and to cover his expenses, to give him one-fourth part of all the increase of the cattle, etc., upon the ranch, when parted at the end of five years. M. B. C. assigned his contract to L. C., against whom a judgment was obtained, and execution issued to the sheriff, who levied upon and sold a portion of the cattle upon the ranch, then claimed by the widow of the said owner, who had died in the meantime. The five years to which the contract was limited having expired, the widow brought trespass against the sheriff for the cattle thus levied upon and sold. *Held*, 1st. That the questions asked by the plaintiff, which might have produced answers showing acts of ownership on the part of the plaintiff, and tending to prove her possession of the property, (which was disputed,) was evidence, and should not have been excluded. 2d. That the true construction of the contract gave no present interest in the live stock to M. B. C., but only to acquire a determinate interest, after the performance of all the stipulations on his part, and that these could not be completed until the expiration of five years from the execution of the contract. 3d. That the undertaking on the part of M. B. C. was strictly personal, the result of the owner's confidence in his skill, etc., and its spirit and meaning was that no other should be substituted in his place. 4th. That the assignee of M. B. C. had no right whatever in the cattle which could be made the subject of a levy and sale.

APPEAL from the District Court of the Seventh Judicial District.

This case was brought before this Court at October Term, 1852, and will be found reported, 2 Cal. Rep. 575, when the judgment of the District Court was reversed, and the case remanded. It was again placed for trial at the November Term, 1852, of the District Court, and was tried by a jury, who, on the 30th November, found a verdict for the defendant, and judgment was rendered against plaintiff for costs. Plaintiff asked for a new trial, which was refused by the Court below. Plaintiff appealed, and again brought the case into this Court.

The pleadings will be found, 2 Cal. Rep. 578. The action

was for the recovery of the value of certain cattle, the property of the plaintiff, alleged to have been seized and driven off by the defendant.

*The defendant answered, and denied the allegations [349] of the complaint, and further answered that the cattle were the property of one Lindsey Carson; that defendant was sheriff, and had placed in his hands an execution against Carson, in virtue whereof, he had levied on the cattle and sold the same, etc., and was authorized so to do by the agent of the plaintiff.

A jury being sworn, Henry Fitch was sworn on the part of the plaintiff, and testified, I am son of plaintiff; mother resided on Sotoyome Ranch with the family in May 1851. Father, Henry D. Fitch, died January, 1849. I was on the ranch when defendant came there with Pierpont and five or six others. Defendant asked me if the cattle I was driving to corral were for him. I said not. He said he was after cattle. I told him there were no cattle there for him. I heard, next day, the cattle were gone. Witness then went in pursuit of them, and saw defendant, who told him he had taken the cattle. Witness pursued them further, and found them in possession of Long, branded with the letters H. F., his father's brand. Long claimed them, and forbid witness from driving them away, and threatened force. He also gave evidence of the value, etc., of the cattle, described the brand as their brand, and otherwise identified the cattle as those he was in search of, and proceeded to say:

Mother moved on the ranch in the spring of 1851, in April. Moses Carson had not been on the ranch for some months. We lived in the old ranch house: not the same Moses Carson had lived in. I was there some time before moving, to take care of the stock, as Carson was not there. Brother William was there: mother sent him. We were the only ones who took care of the ranch for about a year before the family moved. The cattle were branded by myself and William, with the help we hired. Mother directed me to hire. I hired as her agent: she furnished the means. We corralled the cattle during the time we were with them, in 1850 and '51.

Question by plaintiff.—During the year 1850, was the ranch

improved? Defendant objected. Question sustained, and plaintiff excepted.

I think no one took charge of the cattle while we [350] were on the ranch, except ourselves and those under our control; and we kept control till mother took possession, in the spring of 1851. They tried to get possession by force, but we stopped that.

Question by plaintiff.—Was any portion of the ranch cultivated in 1851, before the taking of the cattle?

A portion was cultivated by us, under mother's direction. We raised crops, ploughed with the same oxen taken by defendant. Some of the old cows and steers that were taken were the same that father had turned over to Moses Carson: the oxen were also the same. [The witness testified to a great many other facts, showing ownership of the cattle, unnecessary to report, and also to the possession of the ranch by his mother and the family from 1851, under whose direction he acted throughout.]

On cross-examination, defendant asked the witness, How did you, your mother, and Henry, transact the business of the ranch, before and since the taking of the cattle, as executors of your father's will?

Answer.—I don't know that any one acted as executor before the taking. Since the taking, we have acted under mother's directions, as executors, on the ranch. The cattle taken belonged to the estate of my father. We made a final settlement with Lindsey Carson in the fall or summer of 1851. I was not present when the settlement was made. In the absence of my mother, I did the business of the ranch whilst I was there. I was absent in the winter of 1850 and '51. The cattle sold to Combs was by mother's order. Lindsey Carson lived on a piece of ground three miles from our house.

Plaintiff here introduced a contract between Henry D. Fitch and Moses Carson, (Exhibit A,) which stipulates as follows:

[TRANSLATION FROM THE SPANISH.]

1st. This contract is to be in force for the term of five years.

2d. I, Joseph M. Carson, of my part, do make myself accountable, and oblige myself to take under my charge, the rancho of Mr. Henry D. Fitch, known by the name of Sotoyome, in Sonoma, to be taken care of to the best of my intelligence and knowledge, for its better protection and forwardness.

*3d. Agrees to pay all wages of servants, and for [351] utensils for the work, which shall be my property.

4th. The provisions shall be taken from the produce of the rancho.

5th. I, Henry Fitch, on my part, hold myself responsible to deliver said rancho of Sotoyome, in the month of October, to Mr. Joseph M. Carson, with all the cattle, horses, sheep, etc., that may be found on the rancho in the aforementioned month, and this contract shall be considered good, and carried into effect from the same date.

6th. In recompense for the services of the said J. M. Carson, and to cover expenses that he incurs, I oblige and compromise myself to give him one-fourth of all the increase of the cattle and breeding mares, and two-thirds of all the grain raised, of whatever class it may be.

7th. Of the sheep, I, Henry D. Fitch, agree to give him, J. M. Carson, one-third part of the increase.

8th. There shall be built a manufactory of serapes, woollen cloths, and blankets, the expenses of which will be paid by J. M. Carson, and one-third of all the products shall be given to Henry D. Fitch, free of charge.

9th. The before-mentioned J. M. Carson shall have his branding-iron apart, as we have agreed upon.

10th. At the end of five years, I, Henry D. Fitch, on my part, do agree, in sign of my esteem, to deed him a piece of land of said rancho of Sotoyome, of two hundred acres, English measure, over and above what I have promised to give him for his personal benefit and good, and also of his family and heirs in a direct line, without being able to sell it or transfer it.

11th. In case that H. D. Fitch wishes at any time to place another individual on the rancho, to cultivate the land, or manufacture of any kind, he shall be able to do so independ-

ently of the other stipulations, with the only exception of raising other stock, etc.; and Mr. Joseph M. Carson agrees to this condition.

And to the well fulfilling of this contract, both parties promise and bind themselves, with their personal goods that they have or may have, renouncing all law in them for-
[352] ever, *considering the present as valid as if it were judicial, with all the requisites that the law demands, signing two copies of the same tenor, and before two witnesses, and on common paper, for want of stamped. San Gabriel, June 30th, 1840. Defective sheep not counted.

Witnesses,

P. HUGO REID.

ZELEPA REID.

H. D. FITCH.

M. B. CARSON.*

N.B.—We have mutually agreed to remit the ninth article. There shall be only one branding-iron on the rancho; that shall belong to H. D. Fitch till the goods are parted, at the end of the five years; and in testimony, we sign it on the same day.

H. D. FITCH.

M. B. CARSON.

The foregoing instrument was originally written in Spanish. The translation, as above, is found upon the record.

Henry Fitch, a son of plaintiff, testified that he had seen the cattle sold in Sonoma. They were not in view of those attending the sale, but were thirty miles off. They were taken from the ranch after the sale. M. Pierpont purchased 200 head. The sale was for so many cattle running on the ranch, and not of any particular lot.

The plaintiff offered to prove that the whole cattle were sold, and not an undivided interest. Defendant objected, and the offer was sustained, and exception taken by defendant.

I went on the ranch with mother, who had the charge of the whole affairs of ranch and cattle. Vacqueros were employed from time to time by mother, and paid by her. She

* In the translation, the name signed *M. B. Carson* is written *I. M. Carson*, which seems to be an error. It is, however, taken from the record as it appeared.

employed, and paid the charges down. All help was employed and paid by mother. The corral built by those employed by her. There was no cattle on the ranch with the brand of Lindsey Carson. Those taken had it not. Mother owned the horses that the *vacqueros* rode. She bought 40 or 50 in the fall of 1850. I know no person on the ranch, taking care of it, who was not in *mother's em- [353] ploy. Moses B. Carson sent to mother to come and take possession of the ranch, in the fall of 1850: she went accordingly. I saw M. B. Carson exercise no act of ownership after she went there. I saw the rodio when 295 head, sold to Chiles, were taken. Moses and Lindsey were present. Moses went to the States in 1850. Lindsey came to me for a rodio, and I objected at first, but afterwards ordered the major domo to make one. I acted for my mother.

Question by plaintiff.—“Had the branding been so neglected, that Mrs. Fitch had to brand some of the old cattle in the spring of 1850?” Objected to, and sustained. Exception by plaintiff.

Lindsey Carson came to me for permission to milk some cows, in 1851. I heard him forbid the delivery of the cattle after the sale on execution. He claimed that the sale was *illegal*. At the time of settlement, L. C. said he would make us responsible for the cattle. We gave him 600 head on settlement. He was not charged with the cattle taken by the defendant.

Question by plaintiff.—“Who paid taxes on the ranch and stock in 1850 and 1851?” Objection by defendant. Sustained, and exception by plaintiff.

There was an understanding by Pierpont and me to buy 200 head of the cattle sold by Brockmon, and we did so. Afterwards I bought Pierpont's share, and they never were taken from the ranch. Mother was not on the ranch in December, 1850. While I was on the ranch with William, in mother's absence, I was most in charge. In her absence I disposed of a small lot of stock. She was absent at the time of the sale. I could not say she left me as her agent. I did not so say at the time of sale or on the previous trial.

Question by defendant.—Did you, at the sale, say you

would deliver the cattle sold to the buyer? Objected to by plaintiff. Overruled. Plaintiff excepts. Answer.—I did say so, but that would not make it so.

There never was any regular delivery of things from Carson. I suppose the cattle were the property of H. D. Fitch, deceased. There had never been any division of the estate at the time of taking.

Question.—Have you, in connection with your [354] mother and *Frederick, acted as executor before the sale? Objected to by plaintiff. Overruled. Plaintiff excepts. Answer.—I have with my mother, but do not know as to Frederick.

I sold about 180 head when mother was gone, and received the pay. Mother received a part when she came back. I attended all rodios, and took general charge. Moses Carson was not at the ranch when the cattle were delivered to Chiles. I signed, with mother, on the settlement. I was not present at all the conversation on settlement. I was of age in June, 1851. Not of age at the time of sale. There was some action taken on father's will in 1849. I never gave any bonds. I acted under my mother in my acts on the farm. Mother received the money for the cattle sold. I paid to her when I received money. She made the sales when at home. I was present when Brockmon came for cattle, and mother forbid his taking them, and said she did not know whether Carson had 1 or 1000 head, and that Carson had said he would hold her responsible.

Plaintiff offered to prove that Pierpont went with defendant at the time the cattle were taken; and after the conversation between plaintiff and defendant, Pierpont told defendant he had no right to take the cattle, and defendant said he should take them.

Objected by defendant. Objection sustained. Exception by plaintiff. I never signed myself as executor before sale. I was merely the agent of my mother. That is what I meant when I said I was executor.

The plaintiff also proved by Bijou, the major domo, that he had been hired by her, and went on the ranch in August, 1850, and had lived there till the present time. That Mrs.

Fitch had paid him, and he was employed generally in tillage and in looking after the cattle. Six vacquerios were on the ranch when he went there, one of whom had been in the employ of Moses Carson; all were employed by Mrs. F. after witness went there. The horses were branded with the iron of Henry D. Fitch. Moses Carson told me he had sent word to Mrs. Fitch that he wanted to deliver up the possession of the ranch. After I arrived I never saw Moses Carson take any charge of the ranch or cattle, or give any orders.

A rodio was made when the 295 cattle were delivered *to [355] Chiles. I made it by Henry's order. Lindsey Carson asked me to make a rodio, and afterwards Moses came, but I would not do it. They wanted it in order to get the cattle. I told them I would not without an order from Mrs. Fitch. Moses then brought a written order from Henry; and Henry came and ordered it. Lindsey Carson never took any charge of the cattle. I know the cattle Brockmon took away. They had been corralled about two weeks before, and ran distant from the house from 100 varas to two and a half miles, and were part of a herd of about 600. I saw them all; they were taken at Vacos. I went there with Fred. I counted them three times, oxen, cows, and other cattle, separately, 171 head in all; all branded with the ranch brand.

Witness did not see the cattle taken, and gave testimony as to their value.

The foregoing is the substance of the testimony for the plaintiff.

The defendant produced Lindsey Carson, who was sworn on his part, and testified as follows:

I purchased of my brother, by a written article, 2d September, 1850; was living on the ranch at the time, and a year after I purchased. I took charge of the ranch and stock immediately after I purchased; there were supposed to be 6000 head of cattle or over. I sold between the 2d September and 15th May, some cattle to Chiles, say 295 in January, 1851. The 3d August, 1851, I quit, surrendered up, and made a final settlement; surrendered to Mrs. Fitch and Henry; they gave me their obligation for 500 head of beef cattle and 100 head of stock cattle. They admitted them to be a balance in full

due me, on account of Moses B. Carson's contract. Plaintiff and Henry sold some cattle. I forbid them selling or killing any, only for the use of the ranch, till I was settled with. On the 12th October, 1850, she was going to the lower country, and Henry would transact her business during her absence. Henry appeared to be head man, and not William, while the plaintiff was gone. I lived on the ranch in the summer of 1850 to 3d September; to this time my brother Moses had charge of the ranch. He marked and branded a portion of the cattle in the spring. He had vacquerios on the ranch during that time, and paid them. I sold [356] cattle in *the fall and winter of 1850 to the neighbors by the single head: these were counted in the settlement. I accounted for 400 head, including those my brother had sold. [Witness stated the value of cattle at the time.] My brother told me he worked eight or nine yokes of cattle. I built the adobe house. I lived on the 200 acres after I purchased the interest of my brother. In 1850, had a conversation with plaintiff about delivering the ranch: she told me to count the cattle and turn them over. I asked her to furnish the horses. She offered those on the ranch, twenty-five or thirty. We had at least fifty conversations about the matter till we settled. I refused to turn over the cattle till she settled.

On cross-examination witness said, he went first on the ranch in May, 1849, and lived with his brother; built a mill; went back to the ranch in July, 1850; lived in a camp; went on by consent of his brother, and before he had any claim to the property; was living on the 200 acres when the cattle were taken. Moses said he was to have 200 acres when he settled, and if I would go and settle them he would give them to me. I don't think Mrs. Fitch moved in August, 1850, not till 1851: don't think she lived there between July and September, 1850. Moses had vacquerios after Mrs. Fitch came there in July. I have seen his Indians rodio the cattle but not corral them after Mrs. F. came. He did not mark any after she came. I saw him superintending the parting of cattle for Combs. The Indians were under his charge in doing it. Mrs. Fitch was at the house; the boys may have been present. The major

domo is the overseer of the ranch, and acts under the direction of the proprietor. The cattle were bought of Mrs. F. Combs wanted cattle of Moses on the contract. Moses refused, because plaintiff had ordered him not to deliver the cattle. The only acts of possession I know of my brother Moses exercising, were, that he would come to my house and bring cattle there, and have them killed for the use of the house; he had cattle killed for the Indians at work between July and September, 1850. I don't know if Mrs. F. knew of the killing. Cattle used off the ranch by Moses were accounted for in the settlement. I never marked, branded, corralled, or rodiod any of the cattle. I sold 295 head without her knowledge; she told me the cattle I was selling and using to keep an account of. The cattle I sold (295 *head) were not rodiod by men in my employ. I went [357] to see Henry about a rodio in July, 1851. I thought he was fool enough to do it, and pay for the brands. I don't know but I did tell some of the family not to deliver the cattle to the defendant.

A letter from plaintiff to Lindsey Carson was given in evidence, dated April 22, 1851, asking to "let me know when you shall be ready to deliver to me, in the name of your brother, my ranch and all appurtenances belonging to it.

(Signed) "JOSEFA FITCH."

And the answer of Carson, dated April 25, 1851. Extract: 'The only answer I can make is, that you have some eight months ago taken possession of the same. The last conversation I had with you, you was to have been here in this month, and deliver to me my part of the stock, and all that I want is a compliance with the same; and now, that the time is about out, you will try and make some exertions to comply. I told your son, Henry, since you have been in Sonoma, that I wished the business settled at the time appointed.

(Signed) "LINDSEY CARSON."

The witness, on cross-examination, further stated: I was not present when the cattle were sold on execution.

Question by plaintiff.—Did Mrs. Fitch put any horses on the ranch for the use of the vacqueros in the fall and winter

of 1850 and '51? Objected to by defendant. Sustained, and excepted to by plaintiff.

In my account with Mrs. F. on settlement, the cattle taken by Brockmon were not mentioned. There was nothing said about these cattle in our settlement.

Question by plaintiff.—Did you state to Henry and Frederick Fitch, that if their mother allowed the cattle to go, you would not allow them in the settlement? Objected to by defendant. Objection sustained, and excepted to by plaintiff.

We did not count the stock on 23d August, on final settlement. We made a jumping settlement. I took their obligation for 600 cattle as my share.

It was also agreed by counsel to admit that Pierpont, if present, would swear that plaintiff admitted and said that the cattle in the said complaint mentioned were not, at the [358] time of *the alleged taking, in her possession, but that they were in the possession of one Carson, and had been for a long period of time.

The defendant offered the contract between Lindsey and Moses Carson, which plaintiff objected to. Objection overruled, and exception by plaintiff.

By this contract, Moses B. Carson bargained and sold unto Lindsey Carson "4500 head of cattle, embracing my entire interest in the undivided cattle, more or less, of the Fitch estate, also, 50 head of horses, mares, and colts, more or less, 200 head of sheep, more or less; in fact, the intention is to sell and convey all my right, title, and interest in the undivided stock of the Fitch estate, for and in consideration of the sum of \$20,525. I acknowledge the receipt of \$1000, and the balance in the following bequests, to wit, \$2000 on 1st September, 1851, and so on" (notes for the balance unpaid.) Signed, M. B. Carson, dated 2d September, 1850, and acknowledged the same day before Martin Cooke, Notary Public, and recorded September 3d.

Question by defendant.—When did Moses Carson assign the contract to you? Objection by plaintiff overruled. Exception by defendant.

Ans.—On the 2d September, 1850.

Question by defendant.—What estate is this referred to in

the contract? Objection by plaintiff overruled, and plaintiff excepted.

Ans.—The estate of H. D. Fitch, deceased.

Question.—Where was the stock running at the time you bought of Moses Carson? Objection by plaintiff overruled, and plaintiff excepted.

Ans.—It was running on Sotoyome Ranch.

Witness proceeds.—I don't know that Moses Carson had any other property in the estate taken than what he acquired under the contract of him and Henry D. Fitch. There were no cattle on the ranch that had my private brand on.

The plaintiff also proved by Mr. Billings that he was at the ranch the 11th, 12th, or 13th of May. Mrs. F. wanted advice about the Carson difficulty. Mrs. Fitch made a rodio by her major domo. Did not see the rodio, but heard a noise as of a rodio, *saw the rodio ground, and the [359] marks of cattle, etc. Eight or ten vacquerios were in with the cattle, who were all that day branding and cutting them: they were in the employ of Mrs. Fitch. Carson was there one-half or three-quarters of an hour: he talked about settling, but had nothing to do with the cattle. All the Fitch boys were there, and the whole family. No one apparently had charge of the business except Mrs. Fitch. I left on the 12th May. As I came back, I met defendant and Pierpont going after cattle. There had been a sale previous to this. I think the cattle were taken on the 14th or 15th. I heard the next day they had been taken. I saw them go through the city of Sonoma.

Plaintiff produced in evidence the following receipt:

“Received, May 13, 1851, from the possession of Mrs. Henry Fitch, upon her ranch at Russian River, two hundred head of stock cattle, which I have levied upon and seized as the property of Lindsey Carson, (as the bailee or lessee of Moses B. Carson,) upon an execution of John. A. Griffith v. Lindsey Carson.

(Signed)

“ISRAEL BROCKMON,
“Sheriff of Sonoma County.”

The plaintiff asked the Court to instruct the jury as follows:

1st. That if the jury find that the defendant took the property from the possession of the plaintiff, he is liable to the plaintiff in this action, unless the jury find that defendant was owner of the property, or took by virtue of a legal process against the true owner, or had plaintiff's permission or license to take the same.

2d. That evidence of the plaintiff having corralled, branded, rodiod, worked, and milked the cattle by herself or her agents, is evidence of possession in her, and that it is not necessary for the plaintiff to prove that she was personally and constantly in view of the property, to establish a possession in herself.

3d. That the evidence of Lindsey Carson, if believed, proves the possession of the property to have been in the plaintiff at the time of the trespass.

4th. That evidence that Henry Fitch was agent of the plaintiff, in taking charge of the ranch and transacting business generally, would not be sufficient to prove an [360] agency authorizing him to *consent to the levy and sale, or taking by the defendant of the cattle, so as to bind the plaintiff, and prevent her recovering in this action.

5th. That if the jury find that the cattle were not present and within view of those attending the sale, then the sale was void, unless the jury find that the cattle had the mark or brand of the execution debtor, Lindsey Carson.

6th. That unless the defendant sold the particular cattle taken by him, he was not justified in taking them from the possession of the plaintiff.

7th. That if the jury find that Lindsey Carson owned but an undivided interest in the cattle, the sale of the whole was such an abuse of his authority as would make him liable in trespass to the plaintiff; provided the cattle were taken from the possession of the plaintiff.

8th. That the contract between Henry D. Fitch and Moses B. Carson, did not give Moses B. Carson any legal title to any of the cattle till after the contract was performed by M. B. Carson, and the cattle delivered.

9th. That neither M. B. Carson nor his assignee under the contract with Henry D. Fitch had right to the possession of

the cattle or ranch, after the 12th day of October, 1850 (as against the owners.)

10th. That M. B. Carson, under the contract with H. D. Fitch, had no right to assign his interest in the contract or cattle to Lindsey Carson, and put Lindsey Carson in possession.

11th. That Lindsey Carson, after the 2d day of October, 1850, had no legal right, under the contract between H. D. Fitch and M. B. Carson, and the assignment or contract between M. B. Carson to himself, to either the possession of the ranch or cattle.

12th. That Lindsey Carson, by virtue of the contract between H. D. Fitch and M. B. Carson, and the contract between Moses B. Carson and himself, had no interest in the property that could be seized and sold on execution.

13th. That the evidence of Lindsey Carson does not prove a possession in him.

14th. That there is no evidence showing a possession of the property in Lindsey Carson.

*The District Judge instructed the jury that the 1st, [361] 2d, 4th, 5th, 6th, 7th, and 9th of the foregoing instructions were correct and given. That the remaining ones, the 3d, 8th, 10th, 11th, 12th, 13th, and 14th, are refused, and not given.

For refusing the last-designated instructions, the plaintiff excepted. Verdict for defendant. Plaintiff appealed.

[The Reporter begs to remark, by way of apology for the length of the foregoing detail of the evidence in this case, that in the generality of the concluding part of the opinion of this Court, the whole evidence appears to be embraced, and he did not venture materially to abridge it.]

Halleck, Peachy, Billings, and Park, for Appellant.

The questions of plaintiff's counsel excluded by the Court were evidence. If plaintiff improved the ranch, on which the cattle ran, branded the old and young ones the same spring they were taken, and paid the taxes, they were facts from which possession might be inferred. (Cal. Rep. 264, 5, 6.)

The questions asked on the cross-examination of Lindsey

Carson, that were designed to show that his possession was limited to the 200 acres, were improperly rejected.

The defendant was a mere stranger, and had no right to take the cattle; and the questions concerning the witness Henry acting as executor, etc., were improper.

No evidence was offered to prove that Henry was the agent of his mother, with power to consent to a sale, etc. It was, therefore, error to permit the question, "Did you at the sale say you would deliver the cattle to the buyer?" The effect of this is seen in the verdict.

So the offer of plaintiff to prove that the whole cattle and not a part were sold, it was error to reject. If the sale had been otherwise valid, the sale of the whole, when Carson claimed but a part, would have invalidated it. (2 Hill Ch. 47; 15 Mass. 82.)

It was error to refuse the said instruction. The contract will not admit of any other construction. (See *Hurd v. Darling*, 16 Tr. Rep. 381.)

By the contract, M. B. Carson became the major [302] domo, or *overseer, of Fitch for a term of years, and was to receive his compensation in cattle, and a portion of the crops. He was on the ranch, not in his own right, but as the servant of Fitch. He was to take the ranch under his charge, and take care of it, etc., for its better improvement, etc., and in recompense of his services, Fitch was to give him one-fourth of the increase of the cattle, etc.

Fitch was bound to perform at the proper time, or would have been liable in damages. But Carson was no tenant in common, in any part of the property, and could only acquire a title to such portion as should be set apart for him.

The contract was personal with Carson, had relation to his skill, judgment, etc., in the premises, and could not be assigned.

So the 12th and 13th instructions it was error to refuse.

The verdict was against law. The defendant was a mere trespasser, and his proceedings were void, even as against Lindsey Carson. The cattle were not in view at the sale, and were without the mark of the execution debtor. (See Cal. Statutes, 1850, p. 445.)

Lindsey Carson, it is not urged, had more than one-fourth of the *increase*, yet the whole were sold, including the old stock, in which he never had any interest.

So defendant did not sell the cattle taken, but so *many* in number, including old work oxen and milch cows.

All the evidence shows possession in the plaintiff.

There is no brief filed for respondent.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

There are many very palpable errors pointed out in the record. The various questions asked by the plaintiff, which might have produced answers showing acts of ownership on the part of the plaintiff, and thereby tending to prove her possession of the property, were all proper, and should not have been excluded.

The 8th, 10th, 11th, and 12th instructions, which were asked by the plaintiff and refused, ought to have been given.

The true construction of the contract between Fitch and Carson gives to the latter no present interest in the live stock, but *only the right to acquire a determinate [363] interest, after the performance of all the stipulations on his part; and these could not be completed until the expiration of five years from the execution of the contract.

Furthermore, the undertaking on the part of Carson was strictly personal, the result of the confidence which Fitch had in his integrity, skill, and capacity. It entered into the spirit and meaning of the contract, that he, Carson, should do the duty required, and that no other should be substituted for him.

It is, however, too clear for further argument, upon a proper view of the whole case as presented by the record, that Lindsey Carson, the assignee of Moses Carson, had no right whatever in the cattle which could be made the subject of levy and sale.

The Court therefore erred in refusing the instructions mentioned; for which, and the error of improperly excluding the evidence referred to,

The judgment is reversed, and the cause remanded.

CLYMER, for the case of CONGER and AUKENY, Assignees, v. JOHN F. WILLIS, Sheriff.

¹ ATTACHMENT, MONEY IN CUSTODY OF THE LAW NOT SUBJECT TO.—Money in the hands of the sheriff collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. Where the attaching creditor is without other relief, quere?

¹ IDEM, MONEY IN HANDS OF SHERIFF.—The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner.

APPEAL from the District Court of the Ninth Judicial District, Colusa County.

This was an application against the sheriff to pay over money which came into his hands on execution. The proceeding was under “an act concerning sheriffs,” passed April 29th, 1851.

The following were the facts presented to the Court as agreed upon:

[364] *That at the November Term, 1852, said Clymer obtained judgment against L. H. Sanderson for \$3647, upon which an execution issued and was delivered to H. P. Bernes, then acting as under-sheriff of said Willis, on the 6th November, 1852, returnable in 30 days; the return of which shows that \$3540 had been made thereon by the sheriff; and Willis, by his said under-sheriff, makes a special return, showing that the sum of \$2614 40 was paid over to said Clymer, and that on the 20th November, 1852, there were three writs of attachment issued by Newell Hall, J. P., in favor of different plaintiffs, and against Luther H. Sanderson and Samuel S. Clymer, defendants, by virtue of which, he levied upon the gross sum of \$615 14, of the money he collected, and in his possession, as the money of said Clymer, and admitting the sum of \$310 46 to be due, and claiming to retain the said sum of \$615 14 in his hands, subject to the attachments aforesaid, which he refuses to pay over to said

¹ Cited, *Lightner v. Steinagel*, 38 Ill. 516; *Hill v. LeCrosse & M. R. Co.*, 14 Wis. 293.

Conger and Aukeny, as assignees of said Clymer; to whom Clymer assigned said judgment on the 17th January, 1853, and who made a legal demand on the sheriff for the sum of \$925 60, which they claimed to be due, of which claim notice was duly served on said sheriff, and of this application.

Upon these facts plaintiffs demand judgment against defendant, for the above sum of \$925 60, less the said sum of \$310 40.

The Court refused the prayer and application of the plaintiffs, and ordered, that defendant recover his costs; to which plaintiffs except, and appeal, and as the ground of error, allege that the money attached in the hands of the sheriff was in the custody of the law, and not liable to be attached as the money of said Clymer, and for other causes.

Conger and Aukeny, for Appellants.

The money attached in the hands of the officer, within the life of the execution, is not the property of the plaintiff in the execution liable to attachment, but is money in the custody of the law, and cannot be levied upon or attached. (3 Mass. 289, and cases referred to; 17 Pick. 462, and cases cited.)

The money collected on execution is not a debt due to the *plaintiff in the execution, nor is the officer the [365] trustee or creditor of the plaintiff in the execution. (3 Mass. 292; 2 Hill, 220; 1 Cranch, 117.)

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The remedies of attachment and garnishment are the creatures of statute, and cannot be extended to cases not named in the act.

Money in the hands of the sheriff collected on execution is not a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of. It cannot therefore be the subject of attachment or garnishment. If the attaching creditor of the plaintiff in execution was otherwise remediless, it may be that Chancery would

[368] *JOHNSON, Appellant, v. HENDERSON and PIDWELL, Respondents.

¹ WITNESS, COMPETENCY OF.—Where the evidence of one defendant is as available to himself as to his codefendant, this Court has always held that one is incompetent to testify for the other. And the same rule prevails under like circumstances, where the declaration is in tort, and the defendants are charged as joint tortfeasors.

APPEAL from the District Court of the Fourth Judicial District.

This action was brought by plaintiff against defendants, to recover the value of three horses, which, with three carriages and three sets of harness, were let to the defendant, Henderson, to perform a journey from San Francisco to Angelos, on the 27th November, 1851. And the complaint alleges that by means of the unreasonable, violent, and careless driving of the defendants, one of said horses died during the journey, and that the other two were greatly injured.

Defendant, Pidwell, demurred, and for cause, stated that, as appears by the complaint, this defendant did not hire and receive the said horses, etc., neither was there any contract, express or implied, for the hiring of them, between the said plaintiff and defendant, but that the same were hired, etc., by Henderson alone.

Defendant, Henderson, answered separately, and denied that he made any contract for the hire of said horses, etc., with the defendant, Pidwell; admits that he made a contract with the plaintiff for the hire, and that he received the horses, etc., but denies carelessness, etc., in the use or driving; and admits that one horse died, as alleged, but denies all knowledge of injury to either of them, while in his possession.

Defendant, Pidwell, also answered, and denied any knowledge of the contract alleged in the complaint, but admits that he received a carriage and two horses from the defendant, Henderson, at the time alleged, and drove them, but denies that he drove them in the careless, etc., manner alleged, and admits that one horse died while in his possession.

¹ See Buckley v. Manife, post 441; Sparks v. Kohler, ante 299.

*The case was referred, and the referee examined [369] several witnesses as to the injury complained of, hard driving, the value of the horses alleged to have been lost and injured, etc.

The defendants, Henderson and Pidwell, were, in the course of the hearing, offered by the defendants as witnesses, each for the other. The referee rejected both witnesses, to which the counsel for the defendants excepted.

The referee found that the defendants had driven the horses as alleged in the complaint, and the injuries alleged, and found damages for the plaintiff \$524 60, for which judgment was entered, and defendants appealed.

The question in the Supreme Court was as to the admission of the defendants to testify for each other.

Burnett, for Appellant.

The declaration was not in contract, but in trespass. The referee therefore erred in refusing to admit the defendants to testify, each for the other.

Pidwell was improperly joined. He is not charged with liability on any *contract*, and could not be made liable for the individual torts of Henderson, in which he had no participation.

———, for Respondents.

The only question of law has been waived: 1st, by neglect to appeal from the decision of the Court on the demurrer; 2d, by filing answers, and by omitting to raise the point below. (6 Hill, 621; 1 Morris, 197, 401; 2 Pike Ark. 330; 1 Spencer, 180; 3 How. 215; 3 Iredell, 249; 3 Con. 662; 2 Cal., Porter v. Barling, 12th Feb., 1853.)

The testimony of a defendant for his codefendant, is inadmissible, where it goes to establish a joint defence, and enures to the benefit of the witness. (2 Cal., 10th Feb., 1852, *Hotaling v. Cronise*; *Fort & Wife v. Gooding's Exrs.*, N. Y. Court of Appeals, Oct. 1852.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice concurred.

The declaration is evidently in tort, and the defendants are charged as joint tort-feasors. This being so, it is urged [370] that the *Court erred in refusing the evidence of the defendants for one another.

The defence is the same, both admitting that they drove the horses, and simply denying that they drove unreasonably or violently. It is very certain, then, that this was the point to be established by their evidence, as they must have been confined to the issue. They were together, each driving in separate vehicles, going the same journey in the same time, and the evidence of each one must have availed himself as much as his codefendant. When this happens, we have always held the witnesses incompetent. It is probably seldom, in actions of tort, that this will occur, and when it does, it must generally result from the state of the pleadings.

Judgment affirmed.

O'CONNER, Respondent, v. CORBITT, Appellant.

INJUNCTION, WHEN WILL NOT LIE.—Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States," that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation: *Held*, that the complaint sets forth no principle on which to base a claim.

¹ PREEMPTION ACT—TITLE UNDER PRIOR EQUITIES.—The prospective Preemption Act of Congress of 1841, is expressly confined to the surveyed lands, and was not extended to California at the time of the acts complained of, and the statute of this State, which protects the possession of settlers on public lands, to the extent of 160 acres, was not passed until April, 1852, long after the commencement of this suit. Under neither of these acts can the plaintiff claim any rights, and by his own showing he is a mere trespasser.

POSSESSORY ACTION.—An action brought under the Act of 1850, must show that the possession of the plaintiff has been invaded.

² ACTION FOR USE AND OCCUPATION.—The right to recover for use and occupation is founded alone on contract.

TRESPASS.—A trespass dies with the trespasser.

¹ Sumner v. Coleman, 23 Ind. 94.

² Cited, Ramirez v. Murray, 5 Cal. 223.

APPEAL from the Superior Court of the City of San Francisco.

The complaint in this case sets out that plaintiff, in September, 1849, entered upon a lot of the public lands of the United States, built a house thereon, and fenced and cultivated a *portion thereof, and remained in quiet [371] possession of the same, until Henry Hogan, a foreigner, and not a citizen of the United States, entered upon the same land, and contrary to defendant's wishes built a house thereon. That Hogan has since died, and that defendant, acting as the executor of Hogan, who never occupied the premises, has advertised to sell a large quantity of said land of complainant; which advertisement sets forth that the said land is the property of said Hogan, and to be sold for the benefit of one Hans Hogan, a foreigner, resident of Germany, although the same was in the possession of the plaintiff, a citizen of the United States at the time of Henry Hogan's entry thereon; and prays that defendant be enjoined from selling the same, and that he be decreed to pay the plaintiff \$1000, the rents, profits, and issues, received by Hogan during his lifetime, and costs, etc.

It is unnecessary to state the pleadings or the facts further than they are disclosed in the opinion of the Court, as the case turned altogether upon the allegations set forth in the complaint.

The case was referred, and the referee reported \$1000 damages to plaintiff for defendant's interference, and said that the injunction allowed by the Court against defendant be sustained and made perpetual.

The defendant applied for a new trial, which the Court granted, and it was from this order this appeal was taken.

There were no briefs on file.

HEYDENFELDT, Justice, delivered the opinion of the Court.
WELLS, Justice, concurred.

The complainant alleges that in September, 1849, he settled upon a tract of land, "the same being public land of the United States;" that subsequently a foreigner, named

Hogan, built a house and occupied a portion of the tract, and that now the defendant, as executor of Hogan, is offering the same for sale, and he prays an injunction and damages for the occupation.

Upon what principle his claim is based, I am at a loss to imagine. The prospective preëmption act of Congress, of 1841, is expressly confined to the surveyed lands, and was consequently not extended to California at the time of the acts complained of.

[372] *The statute of this State, which protects the possession of settlers on public lands, to the extent of one hundred and sixty acres, was not passed until April, 1852, long subsequent to the commencement of this suit. Under neither of these two acts, then, can the plaintiff claim any rights. He is himself but a mere naked trespasser, by his own showing, and entitled to no relief, his own averment destroying the presumption of title which the law makes in favor of possession.

The order below is reversed, and judgment here rendered, reversing the judgment of the Court below, and dismissing the complaint with costs.

October 11th, 1853, the defendant petitioned this Court for a rehearing:

1st. Because the cause by consent of counsel was to have been submitted to the Court on written arguments, which had not yet been submitted by either party.

2d. Because there was error in the Court declaring that the statute of this State, which protects the possession of actual settlers on public lands of the United States, to the extent of 160 acres, was not passed till April, 1852, being subsequent to the commencement of this suit. As the act under which this action was brought was passed April 11, 1850, long anterior to the bringing of this suit, and is entitled "An act prescribing the mode of maintaining and defending possessory actions, on lands belonging to the United States," under which plaintiff shows that he has a good cause of action, and that on reference thereto the decision of this case will be found erroneous, and therefore prays a rehearing.

After the rehearing, the following opinion was delivered by HEYDENFELDT, Justice, with which WELLS, Justice, concurred.

In the petition for rehearing, the plaintiff claims that his suit was commenced under the act of 1850, prescribing the mode of maintaining possessory actions on public lands of the United States.

His action, however, is not a possessory action, as, instead of showing that his possession is invaded, his complaint shows no one but himself to be in possession.

The prayer is twofold: first, to prevent an executor's sale, for fear, we suppose, of its imposing a cloud on his title, which cannot be done, because he has no title.

*Second, to recover rents and profits for the use and [373] occupation of the land by the deceased, Hogan; but this cannot be done, because the right to recover for use and occupation is founded alone on contract; whereas the declaration shows that the deceased was a trespasser, and if so, the trespass died with him. And again, no such right is given by the statute which is invoked.

The petition is denied.

TOBIN & DUNCAN, Respondents, v. POST & UPHAM, Appellants.

DAMAGES, FOR FAILURE TO DELIVER GOODS.—In a suit for damages, for the failure of the defendants to deliver goods according to contract, the true rule of damages is the difference between the price agreed between the parties and the market value of the goods at the time of the breach of the contract.

IDEM, SPECULATIVE PROFITS NOT ALLOWED.—The admission of testimony to prove the speculative profits of the plaintiff in such actions is error.

IDEM, EVIDENCE AS TO VALUE INADMISSIBLE.—Where the contract was for the cargo, or all the goods of a given description in a given vessel, and there were no other like goods in the market: *Held*, that the admission of evidence to show what they were worth in broken parcels was error.

IDEM, MEASURE OF DAMAGES.—The difference between the value of the cargo and the contract price is the true measure of damages.

APPEAL from the Fourth Judicial District.

The complaint in this case stated that on the 22d March,

Whitcomb, for Respondents.

MURRAY, Chief Justice, delivered the opinion of the Court. HEDDENFELDT, Justice, concurred.

The only error, which we consider it necessary to notice in this case, is the admission of testimony to prove the speculative profits of the plaintiffs.

The true rule of damages was the difference between the price agreed on between the parties, and the market value of the goods at the time of the breach of the contract.

The fact that there were no Chinese goods in the market at that time, corresponding to the description of those sold by the defendants, did not warrant the admission of evidence showing what *they were worth in broken packages, much less the testimony of the plaintiffs' clerk to prove their amount of sales and profits. The value of a cargo of similar goods might have been ascertained by the testimony of competent merchants, and the difference between the value so estimated and the contract price, would have been the true measure of damages.

Judgment reversed, and new trial ordered.

J. G. STEARNS, Appellant, v. AZOR S. MARVIN,
Executor, et al., Respondents.

APPEAL FROM ORDER, WHEN WILL NOT LIE.—An appeal will not lie from an order of Court refusing to set aside an interlocutory judgment. It should be taken upon the order itself.

APPEAL from the Superior Court of San Francisco.

In the progress of this case, judgment was first entered against the defendants. A motion, founded upon an affidavit, was afterwards made to set aside the judgment and admit other parties, which the Court ordered, in accordance with the application, May 31, 1853. The new parties came in and answered June 1, 1853. And on the 8th August, a motion was made by plaintiff's counsel to dismiss the suit as to the

parties introduced by the previous order, and for judgment against defendant; which motion was denied, and plaintiff appealed.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

In this case no appeal lies from the refusal of the motion made by the plaintiff.

If, as has been held, an appeal lies from an interlocutory order, it should have been taken upon the order setting aside the judgment.

Appeal dismissed.

***SOUTHWORTH, Appellant, v. RESING et al., [377]**
Respondents.

ARREST, QUESTION OF FACT HOW DECIDED.—On a rule to show cause why the arrest of a party ordered by the Court on the allegation of fraud should not be vacated, the question of *fact* involved in it must be decided like any other fact, by the weight of evidence.

IDEM, FOR FRAUD, WHAT MUST BE SHOWN.—To entitle a party to the remedy of arrest, it is not necessary that he should show positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended.

WRIT, WHEN SHOULD BE GRANTED.—As a matter of practice, it is safest to award an arrest, even in cases of doubt, for the defendant is protected by his bond from abuse by the process; without which process the plaintiff may be remediless.

APPEAL from the Superior Court of San Francisco.

The plaintiff in this case on his affidavit procured an order for the arrest of the defendants. The affidavit alleged the purchase of goods by defendants of plaintiff, to the amount of \$18,000, with intent to defraud plaintiff, and as evidence of the fraud, alleged sales of the same goods very shortly after the sale to defendants, at much less than the market rates, and one-third less than the defendants had agreed to pay for them. Defendants procured a rule to show cause why the arrest should not be vacated, and filed their affidavit, in which they denied the allegations of plaintiff, and the fraud,

and produced the affidavits of several persons who purchased quantities of the goods of them, and who testified that the prices at which they bought were the fair market rates; the defendants also set forth in their affidavit a number of mercantile transactions, showing large operations, and set out at length a statement of the special transaction out of which the application for their arrest grew.

In answer to this rule, the plaintiff in his affidavit went into a more particular detail and explanation of the transaction, and accompanying circumstances, and produced the affidavits of several witnesses to sustain his statement and the particulars detailed. The Court, on hearing the case thus presented, directed the order for the arrest of defendants to be vacated, and from this order plaintiff appealed. The statements [378] in the affidavits are long, and the opinion of the Court turning on the weight of testimony, does not require their detail at length.

Treadwell, for Appellant.

The defendants' affidavits are inadmissible to *directly* deny the cause of action or particular facts stated in the affidavit on which the order of Court was granted, and are admissible only to explain and avoid the same by new matter. But if admissible, they do not deny or avoid the facts, etc., sufficiently, but are evasive. (2 East, 453; Tidd's Prac. 189; 7 Taunt. 341; 2 Wash. C. C. 198 and 462.)

No brief for respondents on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Upon examining the affidavits in this case, it appears that the salient points in the plaintiff's affidavit showing cause for the arrest, are sustained by the affidavits of others, who are disinterested witnesses, while they are controverted alone by the affidavit of the defendants.

In trying a motion of this kind, like any other fact, it must be decided by the weight of testimony. To entitle a party to the remedy of arrest, it is not necessary he should show positively the commission of a fraud. It is sufficient if the cir-

cumstances detailed will induce, in a reasonable mind, the belief that a fraud was intended to be perpetrated. And as a matter of practice, it is safest to award an arrest, even in cases of doubt, because the defendant is protected against the abuse of the process by the undertaking of the plaintiff, which the law requires to that effect, while on the other hand, frauds are proverbially concocted with so much artfulness and ingenuity as render them at all times difficult to be exposed; and when such a case actually exists, the plaintiff is remediless, without the process of arrest. A different rule would almost, if not certainly, destroy its efficiency as a legal remedy. Under the circumstances shown by the various affidavits in this case, I think the arrest ought to have been permitted to remain. The order vacating it is therefore reversed, and the cause remanded.

***THE PEOPLE, Respondents, *v.* DOMINGO PERALTA, Appellant. [379]**

DISTRICT COURT HAS NO APPELLATE POWER.—Appeal from the Court of Sessions of the County of Contra Costa, upon an indictment of defendant for assault and battery to the District Court. *Held*, that the District Court has no appellate power

APPEAL from the District Court of the Seventh Judicial District.

Per MURRAY, Chief Justice, HEYDENFELDT, Justice, concurring.

The defendant was convicted of an assault and battery in the Court of Sessions. He appealed to the District Court, where the judgment was affirmed.

We have decided at this term, in *Caulfield v. Hudson*, post 389, that the District Court has no appellate power. It was therefore error to take jurisdiction.

The judgment of affirmance in the District Court is reversed, and the appeal from the Court of Sessions to the District Court is dismissed.

Let the costs abide the final result.

[380] *WAKEMAN, Respondent, v. VANDERBILT,
Appellant.

PLEADINGS, SET-OFF.—The captain of a vessel drew on his owner for \$600, to defray the expenses of the first mate, who was injured on the voyage, and who it became necessary to leave on shore for his recovery. In an action by the captain against the owner for wages, the owner claimed to set off \$450 of the amount of the draft against the claim, on the ground that he was liable for it, but did not produce the draft, or show payment of it: *Held*, that the Court below properly rejected the set-off.

SET-OFF, RIGHT TO.—No right of action can accrue upon a draft until payment. And where there is no right of action, there is no right of set-off.

APPEAL from the Fourth Judicial District.

The complaint stated that on the 27th November, 1851, the defendant was indebted to plaintiff in the sum of \$500, for wages due him for services as master of the steamship "Independence," running between the ports of San Francisco and San Juan del Sud, in the State of Nicaragua.

The defendant pleaded that the plaintiff during the voyage for which he claimed the said sum, and while he was in the defendant's employ, wrongfully paid to Moses Hunt, the first mate of the ship, \$600 of the moneys of defendant—there being then due said Hunt but \$150—and claimed to set off the balance of \$450 against the claim of the plaintiff.

The evidence was, that on the voyage in question, Moses Hunt, the first mate of the vessel, received a wound at Aca-pulco, while in the service of the vessel, and, by direction of the surgeon of the ship, was left on shore at San Juan, as the only measure likely to secure his recovery. He, however, died shortly after. At the time he was left, one month's wages, \$150, was due to him, which, together with three month's extra wages, was paid by a draft on R. J. Vandewater, agent of defendant, for \$600, payable to the order of Bade, White & Co., who advanced the money on it for Moses Hunt. There was no proof that the draft had ever been paid by defendant. Plaintiff's counsel on the trial called on defendant to produce the draft; which he failed to do.

Mr. Vandewater testified that he remembered a draft

drawn *by plaintiff on him, as agent of the line, for [381] \$600 in favor of Bade, White & Co., dated at San Juan, drawn during the voyage in question, and intended to pay the expenses of the illness of Mr. Hunt, and that this draft was not paid by witness, as agent, or during his agency for defendant.

The Court charged the jury that there was no evidence of any counter claim, and the jury found for plaintiffs, \$450 16.

The Court refused a new trial, and defendant appealed.

Crockett and Baker, for Appellant.

There was but one month's wages due to Hunt, \$150. The captain had no right to use the money of defendant without authority: the injury of Hunt conferred no authority. The draft of the captain bound the owner as between the owner and Bade, White & Co., and is to be considered as accepted or drawn by his authority.

Where an agent binds his principal beyond his authority, the agent is liable; and if he thus draws, he is not the less liable from the fact that his principal has not yet paid it: it may not be due, or not presented. The authority to draw is sufficient to make the principal liable without acceptance.

The captain is agent of the owner, with authority to draw. He receives money for a draft, which he negotiates, and misapplies it. Is he not bound to account for it? In this case he paid a demand for which the owner was not liable, without instructions. It was not a draft on the individual credit of the captain, but by virtue of his power to bind the owner. The owner is injured by his liability to pay: actual payment is not necessary to avail himself of the fact in his defence.

Jones, Noyes, and Barber, for Respondent.

The draft was dishonored by Vandewater, the agent of defendant, as shown by the testimony, and was not produced on the trial.

Under the allegation of defendant, that plaintiff had wrongfully expended \$450 of his money, the evidence was not admissible. The testimony showed that plaintiff drew for \$600, on defendant's agent, which draft was cashed by Bade,

[382] White & Co., and which Vandewater, the agent, dishonored. The evidence was not relevant to the issue thus raised. It did not establish the fact that plaintiff had paid out any money of Vanderbilt's; on the contrary, it showed that he had no money of Vanderbilt's in his hands, and was obliged to borrow money on his individual responsibility to repay it; and this in order to defray a debt with which defendant was justly chargeable; and was therefore justly discarded by the Court.

But plaintiff's conduct in reference to Hunt, is justified by maritime law. (2 Mason, 541; 1 Pet. Adm. 142; Ib. 157.)

The master of a vessel cannot bind the owner by draft. (10 Met. R. 380.) His responsibility arises on his implied promise to pay for services at the request of his authorized agent; and the maritime law gives a right of action *in rem*. But the owner cannot be made liable on an unaccepted draft. If the draft was drawn by the owner's authority, there would be an end of the question: he cannot hold his agent responsible for obeying his instructions.

Vanderbilt is liable, as plaintiff insists, but not by *virtue of the draft*, but by virtue of the original fact: the money was furnished for his use to defray expenses, with which he was primarily chargeable.

It is easy to account for the non-production of the draft. Upon its dishonor by Vandewater, it was protested, and returned to the holders for recourse to the drawer.

HEYDENFELDT, Justice, delivered the opinion of the Court.

The decision of the Court below was correct.

No right of action can accrue to the defendant against the plaintiff, on the draft in favor of Bade, White & Co., until the defendant has paid it; and certainly if there is no right of action, there is no right of set-off.

Judgment affirmed.

***JONATHAN WILLIAMSON, Respondent, v. [383]
URIAH P. MONROE, Appellant.**

RECEIVER, APPOINTMENT OF.—When the allegations of the bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver—the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business.

APPEAL from the Fourth Judicial District.

The complaint in this case set forth that the defendant and one Henry Williamson were engaged as partners in general business, for three years, prior to the 10th January, 1853, when they dissolved by mutual consent, and it was agreed that defendant should settle and arrange the business of said copartnership, collect the debts, pay liabilities, etc., and account to the said Henry Williamson for all assets of every description which might come into his hands, and should arrange said business before April, 1853, and pay over to said Williamson, \$15,000 in money, as part of said assets of said firm, to which said Williamson would be entitled; that all the assets of the said firm remained in the hands of said defendant, and under his control, which exceeded \$60,000 in value, and which the bill proceeds to enumerate so far as the complainant had knowledge. That said Williamson, with the consent of defendant, conveyed, on the 14th March, 1853, all his interest and estate in the partnership property and assets, to Napoleon Stone, who, on the 8th May, 1853, sold and conveyed the same to the plaintiff.

And charges that defendant is wasting the property, applying the same to his own use, has not applied the assets in discharge of the debts of the firm, etc., and has refused to account to complainant. That defendant has no property except the partnership property, etc., and prays that defendant may be compelled to answer, etc., and fully account for all the assets, etc., and show his disposition of them, what debts are due, what paid, etc., and that a receiver be appointed to take possession of said property, books, papers,

[384] etc., of the firm, with power to collect the *debts, etc.; and charges that plaintiff believes that defendant will sell said property, assign the notes, etc., for the purpose of defrauding him, unless restrained, and prays for an injunction to restrain him from so doing; and to restrain creditors from paying their debts to the defendant; and that an account may be taken of all matters relating to said copartnership, the debts collected, and the property sold, and the plaintiff paid as he may be entitled to the same, and for further relief.

May 19, 1853, the Court, on the above application, ordered an injunction to issue against defendant, in conformity to the prayer, until further order in the premises.

The answer of the defendant admits the partnership and its dissolution, but denies that he was bound to arrange the business before the 1st April, 1853, or on any other day; denies any promise to pay the said Henry Williamson \$15,000, as his part of the assets, or any other definite sum; but admits that he is bound to settle up the business and pay his equal part to said Williamson. The answer then proceeds to state the condition of the assets, the amount received by him, the amount collected, the amount paid, the amount on hand, and the amount yet due, specifying particularly in each case, as charged in the complaint, and denies any misapplication of the funds, and asserts, that the charge that he has no property except that of the partnership, is false; admits the sale to Stone, but denies that he agreed to pay \$15,000 on the 1st April; that he never refused to account, because an account was never demanded of him, and admits that Stone has stated that he had sold his interest in the property to defendant, but does not know the fact. Denies wasting the estate, and states that he was the acting member of the firm, and knows all about the business, and if the settlement were put into the hands of any one else, the concern would suffer immense loss, and prays that the injunction be dissolved, and that he be permitted to continue to conduct the affairs, etc., and that plaintiff's complaint be dismissed.

There were several affidavits introduced by the respective parties, and submitted to the Court, in relation to the prop-

erty of Monroe, his statements, made at different times, at variance with his answer, which being considered, the Court denied the motion for *an injunction. But fur- [385]ther ordered that J. Parker, Esq., be appointed receiver in the case, and hold the property, money, etc., till the further order of the Court, and to give bond in \$20,000 for faithful performance. Defendant appealed.

No brief for appellant.

———, for Respondent.

It was contended that the order was not appealable: that it did not affect a *substantial right*, but was a mere incident in the course of the administration of justice, the rights of defendant being the same, whether a receiver was appointed or not. (3 Harr. Rep. 338; 7 Code Rep. 3; *Hazeltan v. Wakeman*, 3 Br. Rep. 457; 3 John. Ch. 534; 16 Wend. 369; Barb. Ch. 610, 11.)

Upon bill and answer, and affidavits, the appointment of a receiver, and continuance of the injunction, rests in the sound discretion of the Court. (Sto. Eq., sec. 851; 6 Wend. 369.)

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This action was brought for an account of partnership property, to restrain the defendant from further interfering or controlling it, and for the appointment of a receiver to take possession of all the assets of the concern.

The bill alleges waste, and improper application of moneys of the firm, etc.

It appears from the record that the defendant and one Henry Williamson had been engaged for some three years in various speculations and business; and on the dissolution of the partnership, it was agreed in writing that Monroe should settle all the accounts and wind up the business of the firm. Williamson afterwards sold out his interest to one Stone, who conveyed to the present plaintiff on the 8th day of May, 1853.

Twelve days after the execution of this conveyance, the plaintiff, becoming dissatisfied both with the honesty of his partner and the character of his purchase, commences his ac-

tion to take the property from the custody of the defendant, and to ascertain the nature and quantity of his interest.

[386] *The allegations of the bill are general in their nature; so much so, that the defendant could hardly be indicted if his answer were false, and the equities are fully denied by the answer. The defendant denies that he has been guilty of any waste or improper expenditure, or appropriation of the partnership property.

The plaintiff is certainly entitled to an account, but the record shows no case which would justify the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business, particularly as such transactions are always attended with enormous expense and vexatious delays. The injunction is dissolved, and the cause remanded.

W. D. WILSON, Appellant, v. THE BOARD OF SUPERVISORS OF SACRAMENTO COUNTY, Respondents.

CERTIORARI, ACTION PREMATURE.—A certiorari to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board.

¹ **IDEM, WHEN ACTION WILL NOT LIE.**—The objection, want of jurisdiction over the subject, should first be taken before the Board: it may decide to take or decline jurisdiction, and until it does one or the other, there can be no cause of complaint.

APPEAL from the Sixth Judicial District.

In this case, the plaintiff applied to the District Court for a certiorari, setting forth in his affidavit that he is the owner of a bridge across the Cosumnes River, on the road leading from the city of Sacramento to Drytown and Jackson, which said bridge is of the capacity, etc., required by law; that the said bridge is licensed, and that he is charging toll for crossing the same; and further saith, that Harvey Alvard and J.

¹ Cited, *People v. County Judge*, 40 Cal. 480.

H. Pascal have presented an application to the Board of Supervisors of said county for a license to keep a ferry on said river, at a point about a mile and a quarter southeast of said bridge, which would be of great injury to affiant, by reducing the tolls, etc.; that he has *appeared before [387] the Board of Supervisors, and filed his objection to the hearing of said application, for want of jurisdiction in said Board over the same, which have been overruled by said Board, and the said Board is proceeding to take cognizance of, and jurisdiction over, the said application. He therefore prays for a certiorari to the said Board, to remove the proceedings and record into this Court, etc.

The writ was allowed by the Court, and a motion was made to quash it by the respondents, and the Court, after argument, sustained the motion, and directed the same to be quashed, at March Term, 1853.

The plaintiff appealed.

Latham and Aldrich, for Appellant.

The Board of Supervisors have no jurisdiction over an application for the establishment of a ferry. (Stat. Cal. 1850, p. 97, 210; 1851, 19, 21, sec. 69, p. 500; 1852, 87; 8 Pick. 218.)

The writ of certiorari is the proper remedy. (Stat. Cal. 1851, p. 123; 6 B. Mon. 146; 1 Ala. 95, 342; 2 Ala. 35; 6 Ala. 898; 8 Pick. 218.)

Plaintiff has sufficient interest in the motion to sustain this application. (6 Dana, 44; 2 Edm. on Injunction, 271.)

If the writ would not properly lie, this Court, in a matter of general consequence, would examine the proceedings of the inferior Court, and if proper, quash the writ. (4 Mass. 239; Ib. 669.)

J. H. McKune, for Respondents.

Certiorari only lies to an inferior tribunal, which the Board of Supervisors is not. (Stat. 1851, p. 123, sec. 456.) The writ will lie to cure *excess* of jurisdiction, but not where the tribunal has *no* jurisdiction. (3 Dall. 411; 1 Cond. Rep. 190-192.)

Wilson has no such interest as will sustain his application for the writ. Competition in business will not be restrained.

The writ does not show that the Board of Supervisors had exceeded its jurisdiction. The complaint is that they *are about to exceed*, which is not sufficient. (6 Mass. 72; 17 Mass. 357.)

Until *action* taken, there is no error to correct. The [388] Board *may decide against the application. There would then be no error: the language of the statute is, "*has exceeded*."

The counsel further examined the powers of the Supervisors in the premises, which this Court did not consider.

The notice and petition of the applicants for the ferry are set out upon the record, to which no exception was taken.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The writ of certiorari was sued out prematurely.

If it is true, as insisted by the appellant, that the Board of Supervisors had no jurisdiction over the subject, the objection should first have been taken before the Board. This course might have saved the necessity of an appeal. Without the action of the Board, it is impossible to say whether it would have decided to take or decline jurisdiction, and until it shall do one or the other, there can be no cause of complaint.

The certiorari was properly dismissed, and the judgment is affirmed.

***CAULFIELD, Respondent, v. THOMAS HUDSON [389]
and ADAM HUDSON, Appellants.**

¹ DISTRICT COURT HAS NO APPELLATE POWER.—So much of the act of the Legislature as provides for appeals to the District Court is unconstitutional and void.

APPEAL from the Sixth Judicial District.

This was a proceeding in forcible entry and detainer, commenced before a Justice of the Peace, in Sacramento County, from whose judgment defendants appealed to the County Court, and on the — May, one of defendants, Adam Hudson, was discharged by the Court. October 2d, the plaintiff moved to set aside the order discharging said defendant, and that he be reinstated on the record. On the 9th October, the Court ordered that defendant be reinstated on the record, and the judgment dismissing him was set aside. To this judgment the defendant excepted, and took an appeal to the District Court of the Sixth Judicial District, by whom the cause was dismissed for want of jurisdiction, etc. Defendant appealed to this Court.

The opinion of the Court was delivered by HEYDENFELDT, Justice. MURRAY, Chief Justice, concurred.

An appeal was taken from the County Court to the District Court, and there it was dismissed, on the ground that the Court had no jurisdiction.

This case involves the consideration, whether the Legislature has the power to give appellate jurisdiction to the District Court. The first clause of the 6th section, article 6th of the Constitution, says: "The District Courts shall have original jurisdiction in law and equity, in all cases where the amount in dispute exceeds two hundred dollars, exclusive of interest."

The 4th section of the same article gives, with the same effect, appellate power to the Supreme Court; and the 9th

¹ Approved, *People v. Peralta*, ante 379; *Reed v. McCormick*, 4 Cal. 342; *Townsend v. Brooks*, 5 Cal. 52; *People v. Fowler*, 9 Cal. 86. Cited, *Zander v. Coe*, 5 Cal. 230; *Parsons v. Tuolumne W. Co.*, Id. 43; *People v. Hester*, 6 Cal. 631. Followed, *People v. Applegate*, 5 Cal. 295.

section permits the Legislature to give to the County Courts original or appellate power, or both, in special cases, and in cases arising in Justices' Courts.

[390] *It seems that, in this subdivision of power among the different arms of the judiciary, there was an attempt at great care and accuracy in assigning to each a well-defined portion of judicial duty. In doing this, there must have been some specific object or leading motive, and no other appears so reasonable, as that it was intended to limit, as well as confer jurisdiction, in order the better to secure the independence of this department of the government. For if, as is contended by the respondent, there is no prohibition to an increase of the jurisdiction by the Legislature, it may be at once conceived how readily the functions conferred by the Constitution on the Supreme or Districts Courts may be impaired or subverted, by imposing on those Courts a succession of new duties, which would force them into a sphere of action inconsistent with that already fixed by the fundamental law. If the Legislature can force appellate jurisdiction on the District, they can equally give original jurisdiction to the Supreme Court, and then, by a system of rules which they have unquestioned right to make, compelling the Courts to give preference in hearing to certain causes, or to a particular calendar, the constitutional functions of the Courts would exist only in name: for all practical purposes they would be effectually destroyed.

In arriving at this conclusion, we are fully sustained by authority. In the case of *Marbury v. Madison*, 1 Cranch, the same question arose, upon the construction of the Constitution of the United States. There the act of Congress which was under review, was decided not to be warranted by the Constitution. The opinion on that point of the case forms one of the ablest arguments of Chief Justice MARSHALL; and Mr. Justice STORY, in his Commentaries on the Constitution, embodies in the text as his own, the very language of that opinion. (See 2 Story, sec. 1703.)

The Constitution of the State of Texas has been construed by the Supreme Court of that State, upon the same question, and with the like result.

As early as the June Term, 1850, of this Court, the identical question was raised, in reference to the power of this Court. In the case of *The People, ex rel.*, the Attorney-General, *ex parte*, 1 Cal. 85, it was held that this Court had no other than *appellate jurisdiction, and upon [391] the argument, that as this Court would have had appellate power without the words expressed in the Constitution, so it was useless to define its jurisdiction, if it had not intended to exclude all other.

We are, therefore, after long and mature consideration, constrained to declare that so much of the act of the Legislature as provides for appeals to the District Court is unconstitutional and invalid.

We do not include in this decision any portion of the act which provides for appeals from the Probate Court.

The language of the Constitution in reference to the jurisdiction of the District Court over cases in the Probate Court is peculiar and obscure. The consideration of it is entirely unnecessary for the decision of the question here raised, and any expression of opinion would be *obiter dictum*.

Judgment affirmed.

JOHNSON, Respondent, v. SAMUEL DOPKINS and
CHRISTIANA DOPKINS, Appellants.

MORTGAGE, SUBROGATION OF PURCHASER.—The purchaser of a mortgage is subrogated to the rights of the mortgagee.

IDEM, PURCHASER OF MORTGAGOR'S INTEREST.—Defendant set up title in herself as assignee of the mortgagee, and as lessee of the mortgagor. The plaintiff claims as purchaser at sheriff's sale on a judgment against the mortgagor. The estate in controversy was leasehold, and the judgment of the plaintiff was obtained after the date of the lease: *Held*, that the plaintiff took but the equity of redemption of the mortgagor, subject to the lease of defendants; and *held*, that he had no right to demand possession of the lessee till after the expiration of the lease, and could recover no higher rent than that fixed by the lease, up to the time he demanded possession, after the expiration of the lease.

ACTION, WHEN PREMATURE.—No account was stated in the case, and the cause was remanded, that an account might be taken; and the Court remarked that if it shall appear by the above rule of computation that the rents were insufficient to have paid the mortgage debt of the lessee at the time this suit was brought, then that it was premature, and must fail.

APPEAL from the Superior Court of San Francisco.

The plaintiff complained that he is the owner in fee-
[392] simple, *and entitled to the possession of the building
formerly known as the Pacific Hotel, and now called
the Columbia Hotel, in the city of San Francisco, and the lot
on which it stands, (describing it,) and that defendants are
in possession of said property, and unlawfully withhold pos-
session from him. And further shows that on the 17th Nov-
ember, 1851, he recovered judgment in the District Court of
the Fourth District, against one George W. Bradley, then the
owner of the property, and issued an execution thereon to
the sheriff of said county, who levied upon the said Colum-
bia Hotel and the said lot on which the same stands, and
afterwards sold and conveyed the same to the plaintiff, who
by reason thereof became and is now the owner thereof, and
entitled to the possession, etc. And further saith, that de-
fendants are indebted to him \$2000, for withholding the pos-
session of the last-mentioned property from plaintiff, from
the 5th January, 1852; and a further sum of \$2000, for the
rents, issues, and profits, of the said hotel and property, from
the said 5th January, 1852, till the present time; and prays
that defendants be adjudged to surrender the possession,
and to pay the damages for withholding, etc., and for the
rents, etc.

The defendants answer, and deny plaintiff's ownership, his
right to possession, the unlawful withholding of possession,
and all indebtedness; and show and aver that they are in
lawful possession of said premises, and entitled thereto.
That on the 8th March, 1850, Christopher Russ, the owner,
leased the said premises for the term of three years to the
Tallman Mining and Trading Association, at a ground rent
of \$500 per annum; that said association, on the 22d Novem-
ber, 1850, assigned said term to George W. Bradley, who
made said improvements, first known as the Richelieu Hotel;
that on the 26th December, 1850, said Bradley conveyed his
term in the premises and the buildings thereon, by deed of
defeasance or mortgage, to Jonathan Morse; that on the 30th
April, 1851, Bradley leased the premises to Christiana Keys,
now Dopkins, wife of Daniel Dopkins, defendant, for one

year, to commence on the 1st May, 1851. That on the 1st July, 1851, the said Christiana, then Christiana Keys, contracted with said Morse, for the purchase of his interest, and mortgage on the premises, she paying therefor *\$2500, and said Morse, on the 16th July, 1852, con- [393]veyed to said Christiana, then married to Dopkins, all his right, title, and interest, in the premises, including the buildings thereon and his mortgage, to the amount of \$2500, and the interest accrued and accruing thereon.

And further show, that said Christiana possessed said premises lawfully, as tenant aforesaid, until she became owner by the contract and conveyance with said Morse, and from that time has possessed the same as mortgagee in possession; and that defendant has been since his marriage, and now is, in possession, in right of his wife. That plaintiff has no other or better right than that obtained through Bradley, which is at most but an equity of redemption; and pray that plaintiff's bill be dismissed, etc.

The statement of the case as exhibited on the record shows, that the plaintiff gave in evidence the judgment and sale, as laid in his complaint, that Christopher Russ was owner of the premises, who on the 8th March, 1850, leased to the Tallman Mining Company, for three years, who assigned the lease to Bradley, who took possession of the premises, and was the owner of the buildings thereon, at the time of the assignment to him. That after the sale in January, plaintiff demanded possession of defendants, or payment of rent: they refused to do either; and he demanded possession again after he received his deed in July, 1852; when defendants again refused, and claimed to be the owners of the property. The plaintiff then showed them his deed from the sheriff; and that at the time of the sheriff's levy and sale, Bradley was in the hotel engaged in conducting the same, and that the rent was worth \$300 a month.

The sheriff's book showed, that the sale was made subject to redemption, and that after the time for redemption had expired a deed was executed to plaintiff, under the sheriff's sale. Plaintiff gave in evidence the sheriff's deed to him, dated 15th July, 1852.

Defendants here moved for a nonsuit, alleging irregularities in the deed; which the Court overruled.

The defendants gave in evidence a mortgage, Bradley to Morse, 26th December, 1850; contract between Morse and Christiana Keys, July 1st, 1851; assignment 16th June, [394] 1851, *from Morse to Christiana Keys, wife of Dopkins; conveyance from Morse to Christiana Keys, November 21st, 1851; lease from Bradley to Christiana Keys, 30th April, 1851.

Morse, for defendants, proved, that Bradley negotiated the contract between him and Mrs. Dopkins of July 1st, 1851; that both parties lived on the premises; that Bradley generally made the payments under the agreement; that Bradley also negotiated the agreement of 20th November, 1851, (for property sold by Mrs. Keys to Bradley,) the proceeds of which, \$1200, had been paid to witness; that witness had been paid the \$2500, mentioned in the agreement of July 1st, 1851; the endorsement is signed by Bradley; that the hotel was worth in rents the past year from 250 to 300 dollars per month. That witness held the mortgage and notes from Bradley to him, until June, 1852, and then assigned, and gave one of them up to Mrs. Keys, and still holds the mortgage and the other note, which remain due and unpaid. The endorsements on the contract of July, 1851, are signed by Bradley.

Bradley swore that he leased to Mrs. Keys, 30th April, 1851, and gave the lease in evidence; she kept the house on her own account. The rent went on only till the 1st July, 1851; from the time of the sale, (1st July,) witness only assisted. Witness went to Morse, and told him he would not reduce his debt, unless he agreed to an arrangement, and Mrs. Keys said, she would buy if witness was willing; the agreement was then made between Morse and Mrs. Keys, of the 1st July, 1851; witness sold the furniture in the house to her, after she bought Morse out. She paid him \$100 rent and board; she was to have the house on these conditions before she purchased. After July, witness was there nearly all the time, and was paid for his services.

The jury, by agreement of counsel, and upon a statement of questions, brought in a special verdict, and found as follows:

1st. That the monthly rent or value of the hotel, from 1st April, 1851, to the present time was \$300 per month.

2d. That the monthly rent of the cottages for the same time, including ground rent, was \$150 per month.

3d. That the sale and transfer to Mrs. Keys was done by her in good faith, and with no intent to hinder, delay, or defraud the creditors of Bradley.

*Upon the verdict so rendered, and the undisputed [395] facts, the Court found that the plaintiff was entitled to recover the possession of the premises in the complaint mentioned, and assessed damages for the detention, at the sum of \$2000, and ordered judgment accordingly. Defendants appealed.

Hastings and Morse, for Appellant.

Hager, for Respondent.

The cause was argued at length, but mainly on the construction of papers in evidence, and some technicalities, not considered in the opinion of the Court.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

The conveyance by Morse to Mrs. Keys subrogated her to the rights which he held as mortgagee, and Bradley's consent did not invest her with any greater interest. The only error observable is in the computation of damages by the Court below, and this results from not having an account taken between the parties.

The interest of Mrs. Keys was twofold:

1st. As mortgagee, with a claim of twenty-five hundred dollars derived from Morse.

2d. As lessee of Bradley, the mortgagor, from 30th April, 1851, to 30th April, 1852, at a rent of one hundred dollars a month.

By the purchase at sheriff's sale, Johnson obtained Bradley's equity of redemption subject to the lease to Mrs. Keys, and therefore had no right to demand possession of her until the expiration of the lease, and ought not to recover rent at

a higher rate than that fixed by the lease, up to the time he demanded possession, after the expiration of the lease. And if it shall appear by this rule of computation that the rents were insufficient to have paid the mortgage debt of Mrs. Keys at the time this suit was brought, then it is premature, and must fail, unless the plaintiff offers to redeem, which he may do by the allowance of an amendment.

The judgment is reversed, and the cause remanded, that an account may be taken upon the principles here indicated.

[396] *PALMER & CO., Appellants, v. REYNOLDS & CO., Respondents.

APPEAL, REVERSAL ON.—Where the damages were laid at one thousand dollars, judgment for fifteen hundred dollars was reversed on appeal.

APPEAL from the Fourth Judicial District.

Per HEYDENFELDT, Justice—WELLS, Justice, concurring.

The plaintiffs lay their damages at \$1000. Judgment is rendered in their favor for \$1500. For this reason, the judgment is reversed, and the cause remanded.

S. L. BURRITT, Appellant, v. GIBSON & MAYER,
Respondents.

VERDICT, COURT MAY DIRECT.—The Practice Act confers express authority upon the Courts below to direct a special verdict.

ADMISSIONS OF PARTY CONCLUSIVE.—Where one of the issues was the condition of the goods (hops) in question when they left New York, and defendant had admitted on the trial that "if merchantable when they left New York, he made no claim:" Held, that he was concluded by this admission.

EXCEPTIONS TO VERDICT.—When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issues presented by the pleadings, will not be sustained.

¹ NEW TRIAL, ON NEWLY DISCOVERED EVIDENCE.—An application for a new trial on the ground of newly discovered evidence must state sufficient facts to warrant it.

¹ Cited, *Klockenbaum v. Pierson*, 22 Cal. 163. See note to *Bartlett v. Hogden*, ante 55.

APPEAL from the Superior Court of the City of San Francisco.

The plaintiff complained that in July, 1852, the defendants undertook to procure from the city of New York, and to furnish to the plaintiff at the city of San Francisco, 2000 pounds of hops of the best quality, the plaintiff to pay the fair market value thereof in the city of New York, where the same should be purchased, with insurance, freight, etc., to San Francisco, at five per cent. on the aggregate amount; that on the 25th *November, the defendants presented [397] to plaintiff a bill for 2221 pounds of hops, purchased, as he said, in pursuance of said understanding, at 50 cents per pound, and shipped, etc., which, with freight, etc., amounted to \$1294 50, which plaintiff paid to defendants. That in December following the ship arrived with the hops; plaintiff paid the freight thereon, \$247 62, and the hops were delivered to him; that as soon after their delivery as practicable, they were examined, and found to be unsound and unmerchantable, and inferior and bad in quality, and nearly worthless. That plaintiff notified the defendants of this, and requested them to take back the hops, and reimburse the plaintiff the sum paid by him, which they refused to do. That the said hops were thereupon, after due notice, sold at public auction, for eight and five-eighths cents per pound, the whole yielding net \$165 72, which plaintiff avers was the full value, etc.

The defendants answered and denied the allegations of the complaint, and all indebtedness to plaintiff, and admit that they did order from New York certain hops to be sent to San Francisco, but aver that they so ordered the same at the request of the plaintiff, and as his agents through the mercantile firm of A. & A. Wetmore, commission merchants in New York; that the hops so ordered are the hops mentioned in the complaint, and were, when purchased in New York, "first sort" hops, and were so certified by the legal inspector of hops in said city; that plaintiff paid defendants five per cent. commission for the purchase, and also paid a commission to A. Wetmore & Co.. for purchasing and shipping the

same, and aver that the hops arrived at San Francisco in good order, and were received by plaintiff, he having paid the bill, as stated in the complaint, before the vessel arrived with the bills of lading and inspector's certificate that the hops were "first sort," and deny that plaintiff sold the hops on account of defendants, or sold them at the best price they would bring. And specially deny that the hops were unsound or unmerchantable, as alleged by plaintiff, but aver they were "first sort," etc., when purchased at New York, and when shipped, and so continued till received by plaintiff.

The cause was submitted to a jury, and several witnesses were examined for the respective parties, whose testimony [398] was conflicting as to the quality of the hops, and whether the inferior quality proved by some of the witnesses existed at the time of the purchase and shipment from New York, or was occasioned by the voyage.

After the evidence had been closed, the plaintiff stated to the Court that if the hops were of good quality when shipped from New York, he made no claim.

The Court then instructed the jury to find a special verdict in answer to the following propositions:

1. Were the hops in question, when they were purchased and shipped in New York, "first sort" hops?
2. What was the market value of these hops, when they were received by the plaintiff in San Francisco.

The jury found:

1. That the hops in question, when purchased and shipped at New York, were "first sort" hops.
2. That the market value of the hops when received by plaintiff in San Francisco, was \$1 18 per pound.

Plaintiff moved for a new trial, which was denied, and judgment for defendants was ordered, in accordance with the special verdict. Plaintiff appealed.

Botts and Emmett, for Appellant.

1. The Court erred in directing the jury to find a special verdict, as above set forth.
2. No verdict was rendered upon the issues presented upon the pleadings.

3. The Court erred in refusing a new trial.

Clarke, for Respondents.

The form of the verdict was assented to at the time the case was put to the jury, and plaintiff stated if the hops were merchantable when they left New York, he had no claim. He took no exception to the ruling of the Court in submitting the case to the jury.

The verdict determines that the hops were "first sort," a prime article, and worth the highest price. The form of the verdict below being assented to by plaintiff, is not erroneous. The basis of the action was the inferior quality of the hops. *The jury found they were not inferior, and this [399] finding of the jury warrants the judgment.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The errors assigned in this case are:

1st. In directing the jury to find a special verdict.

2d. That no verdict was rendered upon the issue presented by the pleadings.

3d. The refusal to grant a new trial

These points are not well taken.

The Practice Act confers express authority upon the Courts below to direct a special verdict, and in many cases the practice is a beneficial one, simplifying the issues, and bringing the true questions in dispute directly to the mind and comprehension of the jury. In this case the jury found the only issues involved in the controversy, and the plaintiff appears to be concluded by his declaration on the trial, "that if the hops were merchantable when they left New York, he made no claim."

The application for a new trial, on the ground of newly discovered evidence, does not state sufficient facts to warrant a new trial, and is fully controverted by the counterstatement of Byckman.

Judgment affirmed.

[400] *RUSSEL, Respondent, v. AMADOR, Appellant

FRAUD, DEFENCE NOT WAIVED BY RECEIPT OF PAYMENT.—On a bill for specific performance, defendant alleged fraud in the contract sued upon, but admitted payment of the consideration-money under protest affirming the fraud: *Held*, that the receipt of payment was no waiver of the defence, and that defendant was not estopped from showing the fraud, and that it was error in the Court not so to instruct the jury when requested.

INSTRUCTIONS, PRACTICE ON GIVING OR REFUSING.—The Court must give or refuse the instructions asked for, and no modification which alters the meaning or might mislead the jury can be substituted.

APPEAL from the Third Judicial District.

The petition of the plaintiff set forth, that the defendant entered into his obligation, in writing, on the 25th day of October, 1850, to convey to plaintiff two thousand varas square, of land, (describing it,) on the ranch of said defendant, and to run parallel with a hill, etc., embracing a new corral, etc., the said plaintiff to pay the said defendant \$2000 as set forth; and in case plaintiff paid the above sum, defendant was to call a surveyor and run the lines, and make and deliver to plaintiff a good and sufficient warranty deed; and plaintiff avers performance on his part, and payment of the \$2000, which was received and accepted by defendant as full payment for said land as specified in said obligation; that afterwards defendant refused to cause said tract of land to be surveyed, or to make and execute a good deed for the same; and prays the Court to decree the said land to be surveyed by defendant, according to said obligation, and that he make and deliver to the plaintiff a good and sufficient deed for the same.

The defendant answered and admitted that he made an agreement with the plaintiff to sell a tract of land, part of the ranch, etc., 2000 varas long, and 1000 varas wide, but that it was not true that he agreed to sell to plaintiff a tract of land 2000 varas long by 2000 varas wide, as in plaintiff's complaint mentioned. And defendant avers that he cannot write, or read, or speak English, and that said agreement was obtained

¹ Approved, *Jamson v. Quivey*, 5 Cal. 492. Denied, as to right to insist on instruction as asked; *Boyce v. Cal. Stage Co.*, 25 Cal. 470.

by fraud, etc., and by a misrepresentation of the true agreement between them; that it is true he executed an agreement which he could *not read and did not under- [401] stand, and that plaintiff represented at the time, that it was for 2000 varas long, and 1000 varas wide, and under that representation he signed it, and did not understand the fraud practiced upon him for a long time after its execution; that it is true plaintiff has paid him for the said land according to his said agreement, and that defendant has always been ready, etc., and is now ready to make a full and sufficient warranty deed, and had professed to do so, to the said plaintiff, to the tract 2000 varas long, and 1000 varas wide, according to said agreement.

In the course of the trial, the Court was asked by the counsel of the respective parties to instruct the jury on several points made in the case. The cause in this Court turned upon one of the instructions asked for by defendant's counsel, which the Court refused to give, and on the charge of the Court upon the same point, to both of which, exceptions were taken. The opinion of the Court sets forth the instruction refused, and the charge of the Court in the words of the record.

The jury found that the execution of the agreement was not obtained by fraud, and found for the plaintiff, and the Court decreed that the defendant execute a warranty deed for the 2000 varas square to plaintiff. Defendant appealed.

Amador received the payments by the plaintiff under protest, that the contract did not describe the land according to the agreement of sale.

Brown, Pratt, and Tracy, for Appellant.

In regard to the point "that the acceptance of payment by Amador estops him from setting up fraud," we reply, that when Amador protested at the time of payment that he received the payment upon the contract as he understood it, and then explained it, and not as Russel claimed it to be, and Russel paid him under the protest, that the receipt of the payment does not estop Amador from reducing the written contract to the terms of the verbal agreement upon which it

was founded, and is at the same time a confession on the part of Russel that Amador's interpretation of the contract was correct, and shows a parol agreement varying the terms of the written contract, so as to conform it to Amador's undertaking of it.

[402] *An instruction must be given or refused as asked, and cannot be modified.

Hastings, for Respondent.

The instruction was not modified, but refused, and another instruction given in better language, and as favorable to defendant as the law would warrant. The contract must be enforced as written, or it must be cancelled. A court of equity will never set up and make a new contract; and Amador, having accepted payment on the written contract, could not cancel it, or set up a verbal one, because the parties could not be restored to their original rights. The answer sets up fraud, not mistake, and the issue to the jury was fraud. What was said about mistake need not be considered.

The record shows a waiver of the fraud, if there was any, by acceptance of payment; and if the instruction was erroneous, it was harmless.

Variance from the verbal contract does not imply fraud. "It may now be regarded as settled that a misrepresentation as to a fact, the truth of which a party or his agent has an opportunity of ascertaining, cannot in law constitute a fraud." (Chit on Cont. 589.)

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

Upon the trial of this cause, which was a bill in Chancery for specific performance, the defendant's counsel asked the Court to instruct the jury that "The acceptance of payment by Amador, the defendant, from Russel, the plaintiff, under a protest that the contract incorrectly described the land intended to be conveyed, cannot be construed into a waiver of any rights which Amador claimed to have, to defend against Russel's claim for a larger amount of land than that which Amador claimed to have conveyed;" which instruction was

refused, and the Court charged the jury, "that the acceptance of payment by Amador, under a protest that the contract incorrectly described the land intended to be conveyed, was a circumstance from which the jury had a right to consider whether the fraud, if any, in obtaining the execution of the contract, was waived by Amador or not."

*The instruction asked was correct and pertinent to [403] the issue. The question whether Amador was estopped from setting up fraud was before the jury, and the Court should have instructed them that the receipt of payment under protest did not amount to an estoppel or waiver; while the instruction of the Court might very well have been given as explanatory of the instruction asked for, or for the purpose of directing the mind of the jury to the question of fraud, the waiver of which the plaintiff attempted to establish by such acceptance of payment. We have before held that the Court must give or refuse the instructions asked for, and that no modification of the Court which alters the meaning, or might mislead the jury, can be substituted.

Judgment reversed, and cause remanded.

HENRY MEYER, Appellant, v. H. LARKIN, Respondent.

FOREIGN MINER'S LICENSE.—When a foreign miner, subject to a license tax, was employed by one of a partnership, to work in the mines which were the partnership's property: *Held*, that the employer, and not the partnership, was liable for the tax.

IDEM, LEVY ON PARTNERSHIP PROPERTY, WHEN A TRESPASS.—Where the tax collector levied on the property of the partnership, for the tax due by the foreigner thus employed, and sold the whole claim, and dispossessed the plaintiff (one of the partners): *Held*, that he was guilty of a trespass, for which this action was properly brought.

APPEAL from the Tenth Judicial District, Eldorado County.

The complaint set forth that on the — day of July, 1853, plaintiff was in possession of a mining claim, located according to law, etc., (describing it,) and also the owner of mining tools, upon said claim of the value of \$1100. And that on

said day, the defendant came upon the claim, and pretending to act as a deputy tax collector of foreign miners' tax, sold said mining claim and tools, to one John Doe, (whose real name is unknown,) and put him in possession of the same, and did oust plaintiff of the possession of said claim and tools, to his damage \$2000, and prays judgment, etc.

Defendant answered, that he was in reality a deputy collector of foreign miners' tax; denies the value alleged [404] of the *tools, and the damage, and further says, that defendant had in his employment one John Doe, a foreigner, (name unknown,) who failed to show that he was a citizen of the United States; and refused, and the plaintiff also refused, to pay his tax as a foreigner, according to the statute, etc. And that defendant levied upon, advertised, and sold said property, to satisfy the amount due, to wit, \$4 and costs, from said foreigner, as his foreign miners' tax, pursuant to the statute, etc., in the discharge of his duty as deputy collector, etc., and prays to be discharged, and judgment for costs, etc.

The statement of the evidence by the Court, shows, that on the 13th April, 1853, plaintiff and Hastinger, and two others, all Germans, were the joint owners of the mining claim and tools, mentioned in the complaint, and equally entitled to the proceeds arising therefrom. That Hastinger was sick, and absent at the time, and had one Wittenger, an unnaturalized German, at work on the claim in his place; that the gold as it was taken out of the claim, went into the hands of the plaintiff; and that he and the other owners divided at stated periods. That the claim at this time was paying about \$8 per day to the hands, and that it contained ground enough to furnish labor for four hands, twelve months; that the mining tools were worth \$80. That defendant was acting deputy sheriff, with authority, etc.

One of the joint owners testified, that he and plaintiff and Wittinger, were at work on the claim; that on the morning of the 13th July, defendant came upon the claim, and said he would sell two shares in it for the license tax, due by witness and Hastinger; that he did not sell at that time, but went away and was gone about four hours, and returned and sold

the claim and tools, to one Bufort for ten dollars, and put him in possession; that it was sold for the license tax of Wittenger; that on the same day, defendant gave Wittenger a paper, which witness supposed was a license to him as a foreign miner.

Bufort and another witness testified, that the defendant publicly proclaimed his intention of selling the claim, more than an hour before the sale took place; that Meyer, the plaintiff, was present, and made no objection.

Judgment for defendant, and for costs \$235.

*Plaintiff appealed.

[405]

Hart and Davis, for Appellant.

Defendant sold the entire interest of the partnership, instead of that of Hastinger, who employed the foreigner, and was liable for the tax, and sold the real property, before exhausting the personal, and dispossessed the plaintiff.

The sick partner made the contract of hiring, and not the partnership, (see Laws of Cal., vol. 4, p. 65, sec. 7,) and his interest in the property was liable to be seized, upon demand and refusal to pay; but the law requires that the personal property shall be first sold, and gives recourse to the land for any deficiency, but both cannot be sold together. (See Cal. Stat., 2 vol. p. 84; 14 Johns. 522; 17 Johns. 116.) The seizure was excessive.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

From the facts as found, it is evident that the foreigner Wittinger was the employee of Hastinger, and not of the partnership; consequently, Hastinger alone was liable to pay the license tax. It follows, that the sheriff should have sold only the interest of Hastinger, and therefore, in selling the whole claim, and dispossessing the plaintiff, he was guilty of a trespass, for which the action was properly brought.

The judgment reversed, and cause remanded.

[406] *SLOAN & RHODES, Respondents, v. PETER SMITH, Appellant.

REFERENCE, STATUTE CONSTRUED.—The statute concerning references does not require that referees should be sworn. The imposition of an oath by the Court would be of no effect, other than to put it in the power of the referees to commit a moral perjury, without becoming amenable at law.

IDEM, OATH OF REFEREE.—If the Legislature had intended that referees should be sworn, it would be presumed in this case that they were sworn, the contrary not appearing.

¹ REPORT OF REFEREE, PRACTICE SETTING ASIDE.—Judgment is entered upon a report of referees as matter of course, and the only mode to take advantage of it is, by moving to set it aside, as on motion for a new trial.

APPEAL from the Superior Court of San Francisco.

The plaintiffs brought this action against the defendant to recover \$900, for services alleged to have been rendered to the defendant as attorneys-at-law.

The defendant denied the services, or if services were rendered, averred that they were not worth so large a sum.

The case was referred, by consent of parties, to three referees named, "to hear and determine the cause, and report their decision thereon, and report to the Court."

The referees made "report that \$650 be awarded to the plaintiffs, with costs," and judgment was entered in accordance therewith. Defendant appealed.

The only exception to the judgment considered by this Court was, that the referees were not sworn.

Shattuck, for Appellant.

Although the statute does not in express words require that referees shall be sworn, yet justice requires that men clothed with judicial power should act under the sanction of an oath. All Judges are sworn, so are jurors. The power is derived from a sworn officer, and the party exercising the delegated power should also be sworn. The report in fact constitutes the *judgment*, and only requires the formal order of the Court to convert it into a judgment; and viewed as the basis of a

¹ Cited, *Peabody v. Phelps*, 9 Cal. 225. See *Baker v. Baker*, 10 Cal. 525; *Allen v. Hill*, 16 Cal. 118.

judgment, the functionary who in reality renders it should be sworn.

*In waiving a trial by jury, the party waives no other [407] right, and if a reference is substituted, although by consent, to do the duty of a jury, the substitute must do the duty assigned him under like sanctions required of the jury, and should be sworn.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

This appeal is taken from the final judgment of the Court below, rendered upon the report of referees.

We have already given a construction to the act concerning references, which has settled the practice in the lower Courts, and which covers the errors assigned by the appellant, with the exception of the one that the referees were not sworn.

There is nothing in this point: the statute does not require referees to be sworn. Consequently, the imposition of an oath by the Court would be of no effect other than to put it in their power to commit moral perjury without being amenable to the law.

Again, if the Legislature had intended that referees, like jurors, should be sworn, for the protection of the interest of litigants, it would be presumed in this case that they were sworn, the contrary not appearing. The order of the Court is to report a judgment: the evidence is not a necessary part. On the filing of the report, judgment is entered as a matter of course; and the only mode in which a party can take advantage of it is by moving to set aside the judgment, as on a motion for a new trial.

Judgment of the Court below affirmed.

were disputed. The intention of the reference was clearly to obtain a fair statement of the facts, and the order of the Court seems to have been worded for this purpose.

The report of a referee, like the finding of a Court, [410] should *state the facts found and the conclusions of law. Without this, the parties would be remediless, and their rights concluded in many cases by the arbitrary decision of a referee. The finding should have been set aside.

Judgment reversed, and new trial ordered.

E. N. T. SLOAN, Respondent, v. PETER SMITH,
Appellant.

¹ PLACE OF TRIAL, CHANGE OF, IN DISCRETION.—The granting a change of venue is discretionary with the Court below, subject to review only in cases of gross abuse.

IDEM.—The peculiar condition of things in California is unfavorable to change of the place of trial, or delays in the administration of justice.

IDEM.—These applications often result in a loss of all the rights involved.

IDEM, AFFIDAVIT WHAT MUST SHOW.—It will operate against the application, where the affidavit of the party shows, that all the witnesses of his adversary reside in the place from whence he applies to remove the trial.

IDEM, WHAT TO STATE.—The affidavit should state the facts in such a manner as to enable the Court to draw its own inference, whether or not an impartial trial could be had in the particular case. If it fail in this, it will not warrant the Court in changing the venue.

APPEAL from the Superior Court of San Francisco.

This was an action brought for the recovery of the value of services rendered by the plaintiff to the defendant, as attorney and counselor at law, in divers causes and suits, etc., in which defendant was a party, and for counsel and advice, etc.

The defendant denied all the allegations of the complaint, and moved for a change of venue; and this was the only point considered in this Court. The affidavit of the defendant, on which the motion was based, set forth, that owing to

¹ Cited, Pierson v. McCahill, 22 Cal. 132; Watson v. Whitney, 23 Cal. 378. See People v. Fisher, 6 Cal. 155.

a series of litigations in which he had been involved, affecting the title to certain real estate in the city of San Francisco, and to certain suits which he had prosecuted against the city of San Francisco, there exists in the said city and county a prejudice in the public mind against him, to such an extent that he verily believes he cannot obtain a fair trial; and therefore prays that the place of trial be changed to some other county.

The above affidavit was filed March 21st, 1853, and on the *6th April, 1853, defendant filed another affidavit, [411] in which he further set forth that this suit was brought for alleged professional services rendered by the plaintiff to the defendant, in the litigations above mentioned, and therefore that the subject-matter of said litigation will necessarily come in question in ascertaining the value of said alleged services, and the prejudices existing against the defendant will be brought to bear injuriously against him, and deprive him of a fair trial. And further, that on a former trial, the jury could not agree, and were discharged; and that there is a very large body of lawyers in San Francisco who are interested in sustaining a high rate of fees, and are strongly biased in favor of plaintiff, and against defendant, who exercise a powerful influence in exasperating the public prejudice and odium against defendant, many of whom are witnesses for plaintiff against defendant in this action.

The above affidavit was sustained by the affidavits of six other persons, who testified to the prejudice against defendant.

Plaintiff filed a counter affidavit, in which he set forth that defendant was successful in all his suits heretofore, and that it was for the services rendered by him in these suits, that this action was brought, and that the public have no manner of concern in its result; that it has not been the subject of remark or comment; and from the nature of things, there can be no excitement or prejudice in the public mind, in relation thereto.

The Court denied the application, and the cause was proceeded with to trial, in which the plaintiff recovered a judgment, from which the defendant appealed, and brought the above point before this Court.

Shattuck, for Appellant.

Prejudice is dangerous to the administration of public justice: it is intangible, and may be most oppressive: it is a matter of the mind, and influences the judgment. Of what evidence is its existence capable? Some States prescribe the evidence, but in no State have the facts and circumstances constituting the prejudice been deemed necessary to prescribe. The affidavit of the party that he has reason to believe, and does believe, that a fair trial cannot be had, is all that is required in some States: to require the facts, would be to defeat the law in most cases.

[412] *But defendant has set forth facts, and he is sustained and corroborated by six or seven respectable citizens, and they stand uncontradicted. By the acts of 1853, p. 279, a Justice of the Peace is directed to change the venue, if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair trial. The same rule in the absence of special legislation should prevail in the Superior Court, for the same Legislature has prescribed it, and it cannot be inferred that any other rule was intended in any other Court.

———, for Respondent.

On a motion for change of venue, on the ground that a fair and impartial trial cannot be had, it must be made to appear to the Court, by the statement of facts, that such trial cannot be had in the given case. It is not sufficient for the applicant to swear that he cannot, as he believes, have such trial. That is a conclusion of law for the Court to draw from the facts. (11 Ohio Rep. 128; 12 Wend. 203, 290; 2 Wend. 250; 7 Hill, 148; 1 Cal. 382; Laws of 1850, p. 299, secs. 230, 231, and 232; Laws of 1863, p. 34, ch. 21.)

It is not pretended that there was either prejudice or excitement in reference to this suit, or the subject-matter of it.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The main error relied on by the appellant is the refusal of the Court below to grant a change of venue.

The affidavit states that, owing to certain litigations in which the defendant had been engaged, a prejudice existed against him in the city of San Francisco, which would prevent him from having a fair and impartial trial, etc.

The power of granting a change of venue is discretionary with the Courts below, subject to revision only in cases of gross abuse. The peculiar condition of this State, the daily fluctuations of property, and constant change of population, are unfavorable to changes of the place of trial, or delays in the administration of justice, and the experience of the past few years has shown that these applications too often result in a total loss of all the rights involved. In addition to these considerations, the *defendant shows in his [413] affidavit that all the witnesses of the plaintiff were residents of San Francisco, and openly seeks to escape the effects of their testimony by removing the cause.

The affidavit on its face was insufficient to warrant the Court in changing the venue. The facts should have been stated in such a manner as to enable the Court to draw its own inference, whether an impartial trial could be had in the particular case, admitting that a prejudice did exist in the community against the defendant. That prejudice is not so connected in the affidavit as to show any operation between the parties in this suit.

Regarding this as a discretionary power, coupled with the fact that the cause was then on the calendar for trial, and that this was the second application for a change of venue, we cannot come to any other conclusion than that the Court properly overruled the application.

There is no weight in the other errors assigned.

Judgment affirmed.

**ALEXANDER SPECK, Respondent, v. HENRY P. HOYT,
Appellant.**

NEW TRIAL, GRANTING OR REFUSING IN DISCRETION.—Refusing or granting a new trial will not be disturbed, except where there is a gross abuse of discretion. Nor where the decision of the Court is upon bare questions of fact.

¹ **APPEAL, REVIEW OF ORDER GRANTING NEW TRIAL.**—But where the question of law was adverse to the verdict, and the Court might well have granted a nonsuit, or instructed the jury to find for the other party, a new trial should have been granted; and the refusal to do so was such an improper use of its discretion as calls for the exercise of the revisory power of this Court.

APPEAL from the Superior Court of the City of San Francisco.

The complaint alleges that the plaintiff, on the 12th September, 1852, was owner of one-half of the schooner *Goliah*, of the value of \$6000, which was moored at the port of San Francisco; that on the 15th December, 1852, defendant took the said schooner and converted her to his own use, and being unlawfully possessed of her as aforesaid, sent her to Angel Island, where she was damaged and spoiled, and plaintiff lost his half of her, to his damage \$3000, the half value of said schooner; and prays judgment, etc.

[414] *Defendant answered and admitted that on the 15th

December, 1852, the plaintiff was owner or claimant of said schooner, of the value of \$4000, and not \$6000 as alleged, and denies that he or his agents removed the schooner, or took her out of plaintiff's possession, on the 15th December, or at any time, or converted her, etc., or that he sent her to Angel Island, whereby she was broken, etc., and denies interfering with said vessel in any way whatever, or with having her in his possession or control since the 12th December to this date, and denies all allegations of trespass, etc.

The evidence showed that the vessel was formerly the property of the defendant, and that on the 28th October, 1852, he sold and transferred her to the plaintiff and one Moffit for \$4000; received \$1000 in cash, and took the obligation of Moffit and plaintiff, for \$3000, the balance of the purchase-

¹ Cited, *Hastings v. Steamer Uncle Sam*, 10 Cal. 241. See *Drake v. Palmer*, 2 Cal. 177; *Palmer v. Stewart*, Id. 853.

money, payable twelve months after date, with interest at the rate of four per cent. per month, payable monthly, dated October 28th, 1852, and this was secured by a mortgage of the vessel.

F. Southorne, called for plaintiff, proved that he bargained with defendant for the charter of the vessel, which was reduced to writing, as follows:

"Received, San Francisco, December 15th, 1852, from F. Southorne, \$120; on account of which I hereby consent that the schooner Goliah may make one trip to Angel Island, and back, not assuming any risk of loss of vessel or any damage that may happen, which sum is to be in full for the use of the boat for the voyage, or money returned.

"HENRY P. HOYT."

The witness proceeded to say, "I got the vessel of Hoyt, and got the writing of him. I took possession of the vessel pursuant to this agreement, and appointed a captain, and sent her to Angel Island. She dragged ashore in a gale of wind, on the Contra Costa side of the bay. Hoyt then bought her at the marshal's sale, and brought her away."

On cross-examination the witness said, he never obtained the consent of plaintiff or Moffit for the taking of the vessel; that he had asked plaintiff for his consent, which he refused to give; that he had shown the agreement with Hoyt to both Speck and Moffit, *before he took the vessel, [415] and asked Moffit's consent to take her, which he refused. That Moffit gave him some kind of writing. "I don't know now what it was. I never saw the paper since, that I know of. It is lost. I don't recollect its contents. Can't say whether it contained his consent to take the vessel or not. I asked Moffit for the paper, to clear me of responsibility if I took the vessel. It contained words to free me from responsibility. I cannot say if it was a consent or not. It was after I received the paper from Hoyt." In answer to the question, "Did Speck say you should not take the vessel?" witness answered, "I know he did not like it, but cannot say he said I should not take her."

I had men on board, and she sailed the evening I got the paper from Hoyt, to Angel Island. The old captain under

Speck and Moffit was on board when I got the agreement from Hoyt. I paid Hoyt when I got the paper the \$120 mentioned therein. In my conversation with Hoyt, he said the vessel had done damage in coming up the harbor, and he would stop the freight-money: he did not say he had commenced a suit to stop the freight.

I. Hoffman, a hand on board the vessel on her last trip, testified that Hoyt was at the vessel in the morning of the day she sailed, and said she had been doing damage in the harbor, and should not go out until he gave orders, and had seen further into it. He said the vessel belonged to him: this Hoyt repeated the same day. After Southorne's man came on board, Speck removed his things from the vessel.

T. Moffit sworn, for plaintiff.—Proved the purchase of the vessel from Hoyt by him and Speck, as stated above. The vessel did some damage in the harbor, and Hoyt stopped the freight. I did not consent to Southorne taking the vessel at any time. He wanted to buy her. I told him to go to Hoyt: that he had taken the responsibility. On cross-examination, witness said he had no interest in the suit. I have since sold out my interest in the vessel. If Speck succeeds in this suit, I intend to bring a suit for my share. (Here the defendant moved that all the testimony of the witness be ruled out, which motion the Court overruled.) Southorne showed me the paper he received from Hoyt, and asked me to [416] sign it. I refused. This was the day *he took the vessel. He asked my permission to take the vessel. I refused, but I gave him a letter, which was about this: "If Mr. Hoyt has taken the responsibility to let this vessel go, I'll have nothing to do with it, but hold Hoyt responsible." This paper I gave to Southorne after he showed me the receipt from Hoyt. Southorne then said he was going to Angel Island after a load of stones. I did not forbid him to take the vessel. On the 1st December I paid \$120 for one month's interest due on the note to Hoyt. I referred Southorne to Hoyt, when he wanted to buy the vessel, as he had taken the responsibility of stopping the freight.

The defendant moved the Court for a new trial which the Court refused.

The Court instructed the jury:

1st. That they were the judges of the weight and credibility of the testimony.

2d. That Hoyt's written permission, of itself, does not constitute a taking "out of the possession of the plaintiff;" nor does it constitute a conversion of the vessel to the defendant's own use, as alleged.

3d. That the mere stoppage of the freight-money would not of itself amount to a wrongful conversion of the vessel.

4th. That Hoyt's written permission is not a charter-party.

The defendant asked the Court to charge as follows:

That the plaintiff, being the joint owner of an undivided interest, and tenant in common with Moffit in said schooner, cannot sue without joining his co-tenant.

Which the Court refused to give.

Defendant also asked the Court to charge:

That if the jury find from the evidence that Moffit, who was used as a witness by plaintiff, was united in interest with the plaintiff in the ownership of the schooner now, or at the commencement of this suit, they should find for defendant. Refused.

That plaintiff, to recover in this suit, must show that the defendant took the vessel into his possession without the express or implied consent of the plaintiff, or Moffit, the joint owner with plaintiff. Given.

That if the jury find from the evidence that the said schooner *was taken on the voyage by Southorne by [417] common consent of the parties, *i. e.*, Speck, Moffit, and Hoyt, the jury should find for the defendant, even though Speck may have expressed his approbation merely in reference to the arrangement made for the voyage.

That the Court gave.

The jury brought in a verdict for plaintiff for \$2000.

The defendant, on the preceding case, moved the Court to vacate the verdict rendered by the jury, and to grant a new trial.

Because the verdict was against and contrary to the evidence, and against law, and the instructions of the Court. And for error in law, in allowing defendant's receipt to be

read in evidence, to prove a taking and conversion of the vessel.

June 13. The defendant moved for a rule to show cause why additional reasons for a new trial should not be filed. The plaintiff moved to vacate the rule, and read his affidavit, which set forth, that this cause had been twice tried, in March and in April, 1853; that on both trials, Southorne, referred to in defendant's affidavit, had been sworn and examined as a witness, and his testimony was substantially the same in both. That Southorne is a seafaring man, and had left this port openly as mate of a vessel bound for Sydney, about the first of the present month, and avers that Hoyt well knew that he had left as aforesaid; and yet entered a charge of perjury against him, and advertised \$100 reward to any one who would produce his person, etc., and avers that this was for effect, etc.

The affidavit of defendant in behalf of the motion, stated that it was false that Southorne had paid him \$120 for a charter-party of the schooner; that since the trial he, Southorne, had exhibited to the affiant the written permission of Moffit to the charter of the schooner; denied by him when sworn as a witness on the trial; and had also exhibited it to one W. H. G. Lester, whose affidavit he presents, and that he can prove the falsehood of the statement of Southorne as to the payment of the \$120 for the charter, etc., by one James Costello, and offers his affidavit, etc., and that he had not been able to establish the proof as to the false swearing,

until since the motion was made for a new trial. And [418] that he has caused a warrant of arrest to issue *against

Southorne for perjury. The affidavit of Lester stated that since the trial Southorne had exhibited to him a written permission of Moffit to take the schooner to Angel Island; that Southorne wanted a favor of him, and by exhibiting the paper, placed himself in the power of the affiant.

The affidavit of Costello corroborated the above.

The Court refused the new trial, and defendant appealed.

Crockett and Baker, for Appellant.

The sale of the vessel was only conditional, Hoyt being the

owner in fact. Plaintiff admitted Hoyt's claim for \$2000. Hoyt said in plaintiff's presence, she could not go till his claim was satisfied. Speck knew that Southorne would take the vessel, and did not forbid it.

Moffit should have been excluded as a witness. The suit was prosecuted for his immediate benefit, he being a partner of plaintiff. The trespass was not committed on the half of the vessel, and the joint note of Moffit and plaintiff was given in payment. Plaintiff is responsible to his partner for half the amount recovered. If the note is collected by Hoyt, Moffit can get half the judgment against Hoyt, recovered by Speck. If Hoyt should die insolvent, Moffit would be entitled to half this money secured by his own testimony.

There was no conversion by defendant, because of the property in him. He only gave his consent to the voyage, writing the permission of plaintiff, whose consent was to be implied by his conduct, and Moffit's discharge of Southorne from responsibility.

One joint-tenant cannot support this action: the possession of one is the possession of both.

If the owner of goods stands by, and permits another to treat them as his own, he cannot recover the goods. Hoyt was allowed to treat the vessel as his own: neither Speck nor Moffit forbade his interference.

Joint-owners of a ship, for obvious reasons, are allowed greater latitude than tenants in common of other property.

There is no evidence that Southorne acted as Hoyt's agent, as charged. He acted for himself.

**Sharp, for Respondent.*

[419]

Non-joinder by tenants in common can only be pleaded in abatement. (1 Chit. Pl. 66, and notes; -6 T. R. 766; 7 Ib. 279; 2 Com. Law Rep. 54.)

If the objection is not taken by demurrer, it is waived. (See 17th sec. Pr. Act, and sec. 45.)

This Court will not disturb the finding of a jury on evidence, when the Judge who tried the cause is satisfied with the finding.

The only issues below are *conversion* and *value* plaintiff's

ownership is expressly admitted by defendant's answer. There was no evidence to show any right in defendant to dispose of the property.

Moffit was a good witness even at common law. But our statute, sec. 393, Pr. Act, makes interest in the event go to the credibility.

The additional affidavits were not filed in time. The witness Southorne, as to the matter of the paper, was defendant's witness, and of course could not be impeached by him. (2 Den. 109; 4 Johns. 425; 5 Johns. 248; 14 Johns. 186; 10 Wend. 285; 1 Con. 359.)

The appeal is for delay.

HEYDENFELDT, Justice, delivered the opinion of the Court.

There is in this case no conflict of evidence whatever. It matters not that the defendant, for his own security, had verbally stopped the freight-money. This seems to have given much offence to the plaintiff and his part-owner; and they therefore appeared to decline the proper care and responsibility which belonged to them as owners.

The act of Hoyt, in receiving the hire from Southorne, and giving his consent for the vessel to make a trip to Angel Island, was no trespass. Taken in connection with the fact that he had stopped the freight-money previously, it amounted to a waiver of his design for this one occasion; and therefore it was no authority to Southorne to take the vessel without the consent, or otherwise, than acting under the direction of the plaintiff and Moffit. So it was evidently understood by

Southerne, because we find him applying to them for [420] their consent, notwithstanding *he had obtained the plaintiff's. It was an easy matter for them to have prevented any interference with their property, by simply objecting; but they made no effort to do so, for although they did not affirmatively consent, they did not prohibit Southorne; but on the contrary, acting under a mistake as to their legal right and remedy, they implied a consent by saying that they held Hoyt responsible.

The Court below charged the jury properly as to all the points which are here considered. The only error, therefore,

to be passed upon is the refusal to grant a new trial, and relieve the defendant from the strange and unaccountable verdict of the jury.

We have invariably held that refusing or granting a new trial would not be disturbed, except when there was a gross abuse of discretion; nor when the decision of the Court is upon mere questions of fact.

In this case, however, as a question of law, it is beyond dispute that the defendant is not liable. The Court might well have granted a nonsuit, or instructed the jury to bring in a verdict for the defendant. It is the least, then, it could have done to grant a new trial; and the refusal to do so is such an improper use of its discretion as calls for the exercise of the revisory power of this Court.

The judgment is reversed, and the cause remanded.

[NOTE.—A petition was filed for a rehearing in the above case by respondent, on the 13th December, on which is endorsed, per MURRAY, Chief Justice: "Let a stay of proceedings be entered, until the further order of this Court."]¹

*PARSONS, Administrator, etc., Respondent, v. [421]
JOHN DAVIS, Appellant.

² APPEAL FROM JUDGMENT OF COURT OF FIRST INSTANCE.—Where the action in the District Court was founded upon a judgment in the Court of First Instance, and an appeal was taken from the judgment of the District Court, the record of the Court of First Instance was brought up by certiorari to this Court, and the judgment was found invalid. The judgment of the District Court was reversed, and the case remanded.

APPEAL from the Fourth Judicial District.

This was an action founded on a judgment in the Court of First Instance. The complaint was filed the 8th January, 1852, and set forth that on the 13th April, 1850, Charles

¹ Rehearing denied, Jan. T. 1854, and remittitur transmitted.

² Distinguished, *Whitwell v. Barbier*, 7 Cal. 64. Cited, *Schloss v. White*, 16 Cal. 68,

Swanson, now deceased, but then living, by the judgment and consideration of the Court of First Instance, duly given, etc., recovered against the defendant the sum of \$5815, which judgment is still in full force and unsatisfied, and the plaintiff avers that he is the special administrator of the estate of said Swanson, and entitled to recover said judgment, and prays judgment for the said sum with interest.

On the 10th January, 1850, the affidavit of James Wilson was filed, which stated that John Davis, the defendant, is a resident of London, as appears by letters from him dated in October, 1851.

On the same day the plaintiff filed his affidavit, in which he swore that the judgment in the Court of First Instance above stated, was wholly unpaid and unsatisfied; that the cause of action was one arising on contract, and that a summons had been issued and returned.

On the same day, 10th January, 1852, Charles M. Delaney was by order of the Court appointed attorney for defendant herein.

And on the 13th January, Mr. Delaney answered as attorney for defendant, and denied generally and specially each and every allegation in the said complaint contained, and prayed to be dismissed with costs, etc.

On the same day the following agreement was filed: "It is hereby mutually consented and agreed that the above [422] cause be *and it is hereby referred to James D. Galbreath, Esq., sole referee herein, to hear and decide all the issues in said case. January 13th, 1851.

(Signed)

"CHARLES M. DELANEY,

Defendant's Attorney.

"WOOD, COOKE, and OLDS,

Attorneys for plaintiff."

On the 14th January, 1852, the referee filed his report, which set forth, that he found on the records of the late Court of First Instance, a judgment remaining open against said Davis, in favor of Charles Swanson, (since dead,) for the sum of \$5815, rendered on the 13th day of April, A.D. 1850, and that he cannot find any entry of credit or satisfaction of said

judgment on the records of the said Court; and that there is now due to said plaintiff, administrator, etc., from said Davis, including interest from 13th April, 1850, the sum of \$6832 65, for which sum he recommends judgment to be entered.

On the same day, the 14th January, the report of the referee was confirmed by the Court, and judgment entered against defendant for the said sum, with costs etc.

On the 13th January, 1852, the plaintiff filed his affidavit, setting forth that execution had been duly issued upon the said judgment, and placed in the hands of the sheriff. That defendant is not resident of this State, and has no property therein. That one Nicholas A. Den, of Santa Barbara, and now in this city, is indebted to said defendant in an amount exceeding \$1500, etc.

On the 15th January, the Court ordered said Den to appear before Galbreath (the referee) to answer concerning the same.

On the 16th, Den appeared as directed before the referee, who being sworn said that in January, 1850, he purchased of said John Davis a piece of land in Stockton, California, for \$8000 or \$9000, cash in hand, and an annuity to him and his wife of £300 sterling a year, payable semi-annually, in July and January, at Liverpool, England, during their natural lives; that he had paid the first half year's annuity. As near as he could then know, there was due by him, on the 2d January, 1852, the sum of \$1500; that he had off-sets against said Davis for the whole of the first year's annuity. The referee ordered that the said \$1500 be applied to the satisfaction of the said judgment *against the said [423] John Davis, in favor of the said Parsons, administrator.

On the 12th January, on motion of Mr. Emmett, the Court allowed defendant to appear and answer to the merits, and that all proceedings under the judgment be stayed.

The defendant answering denied, that on the 13th April, 1850, the said C. Swanson recovered the sum of \$5815 against him, and denies that there is any judgment in the Court of First Instance, as alleged in the said complaint; or that, if a judgment, as alleged, is against him, he had no previous notice thereof, or of any suit, etc., to recover the same. And denies that he is indebted to the said plaintiff in any sum

whatever; and denies that Parsons is the administrator, etc., or entitled to sue or recover the said alleged judgment.

On the 3d August, 1852, the Court, sitting as a jury, found that Parsons was the administrator, etc., of Swanson, and that judgment was entered in favor of Swanson against Davis, in the Court of First Instance, on the 13th April, 1850, for \$5815; and ordered that the judgment heretofore entered in this case, on the 13th January, 1852, for \$6852, be confirmed, and stand as the judgment in this cause in all particulars.

The record of the Court of First Instance, accompanying the record of the District Court, shows that on the 13th April, 1850, Charles Swanson filed his complaint, in which he states that about the 25th September last, Robert Swanson, as his agent, entered into a contract with one John Davis, that if he would build upon lots of Davis's, in Stockton, three houses, that the land and houses should be owned in common between them. That in consideration thereof, he built the houses to the said Davis's satisfaction. That Davis, not regarding the contract, sold the lots and houses for \$5000 cash down, and an annuity of a large amount, to be paid to him and his wife. That Davis had not accounted to him for his interest in said lots, but sold the same with intent to cheat and defraud the complainant of his property, to his damage \$10,000. That Davis has gone out of the jurisdiction of this Court; and prays that process may issue, and that publication be had of this proceeding, commanding said Davis to appear and answer this complaint, and that judgment, to the amount of the damages, be rendered against him, etc.

[424] *Robert Swanson, being sworn, testified that the facts set forth in the complaint were true.

On the 27th February, 1850, the Court ordered that the publication of the proceedings be made in a newspaper published in San Francisco, commanding said Davis to appear and answer, etc., and that a rule be entered to take the depositions of going witnesses before T. Smith, Esq., one of the commissioners of this Court, to be read on the trial of this cause.

The notice, as directed, was published in the "Pacific News," of which proof appears upon the record.

On the 13th April, 1850, judgment was entered for the plaintiff for \$5815.

Parsons, for Respondent.

The judgment is in accordance with the statute, secs. 179 to 181 inclusive, Prac. Act. The judgment of the Court of First Instance is good. The Court had authority under the laws of Mexico to render such judgment. (*Zamiego Practicis Forencio*, vol. i., p. 211; for translation, see note B, 1 Hill, 139.)

From this judgment the appellant had two years to appeal, and not having appealed, he is bound by it. (Stat. 1850, Act to supersede certain Courts, p. 77, sec. 6.)

An appeal brings up no more than a writ of error at common law. (3 Sandford, 593.)

Note B, above referred to, is thus given: "When the person cannot be found, the place where he is gone to is not known, or if those to be cited are numerous and uncertain, the citation shall be made by advertisement (or notices) affixed in public (conspicuous) places of the jurisdiction (tribunal) and its neighborhood, and inserting them in the official bulletins, in the Gazette, or other periodicals." (*Elementa Practica Forense*, vol. i., 211.)

No brief for the appellant on file.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

This was an action upon a judgment of the Court of First Instance, the records of which belong to the District Court. The judgment which was the basis of this suit was rendered without *any personal service on the defend- [425] ant, and indeed without any service which by the laws then in force could be deemed an equivalent for personal service. There is, therefore, no dispute that the judgment of the Court of First Instance is invalid, and insufficient to sustain the present judgment, provided that the record of the first-mentioned judgment is properly brought before us.

This has been done by a certiorari from this Court, and it is insisted by the respondent that it should have been made

part of the record of this cause by a statement of it as evidence, or a bill of exceptions. The sole object of a bill of exceptions is to make a record of the special action of the Court of what is not record by the general law.

By such action it attains the sanction and verity which enables the revising Court to consider it. But that which is a record already, cannot receive any higher degree of sanction by being made record a second time.

Where, therefore, it appears from the declaration that the Court below must render judgment simply by an inspection of its own records, it is obviously the most proper mode upon an appeal to bring up the latter by a certiorari, in order that it may receive the construction of the appellate court, which is the only object of the appeal.

Judgment reversed, and cause remanded.

[The above opinion was filed December 5, 1853. December 12, an elaborate petition was filed for a rehearing of the case, and on the same day the Court ordered all proceedings to be stayed until the petition could be heard.]

[426] *WHITE and WENTWORTH, Appellants, v. ABERNATHY, CLARK & CO., Respondents.

APPEAL, ERROR MUST AFFIRMATIVELY APPEAR ON RECORD.—To disturb a judgment of a Court of original jurisdiction, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record.

¹ **IDEM, WHAT INSUFFICIENT TO SHOW ERROR.**—The naked direction of a Court, unaccompanied with any statement of facts, cannot support allegations of error: they may be in reference to the facts merely abstract, or inapt to mislead the jury.

APPEAL from the Superior Court of the City of San Francisco.

The opinion of the Court was delivered by **HEYDENFELDT**, Justice—**MURRAY**, Chief Justice, concurring.

¹ Approved, *Nelson v. Lemmon*, 10 Cal. 50; *Nelson v. Mitchell*, Id. 98.

The record contains no relation of the facts as they were disclosed in the Court below, and the only bill of exceptions is one which contains the directions of the Court to the jury. All intendments must be in favor of sustaining the judgments of Courts of original jurisdiction, and to disturb such judgment, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. Therefore, the naked directions of a Court, unaccompanied with any statement of facts, cannot satisfy us of substantial error, although some of the directions may not be in consonance with the rules of law. They may be, in reference to the facts, merely abstract, or only detrimental to the party not complaining of error, or totally inapt to mislead the jury.

Judgment affirmed.

***POWELL'S HEIRS *v.* HENDRICKS. [427]**

¹ **PROOF OF HANDWRITING, WHEN ADMISSIBLE.**—To admit proof of the handwriting of a witness to an instrument, it must be shown that the witness is beyond the jurisdiction of the Court, or that he could not be found after diligent search for him had been made; that his absence may be inferred.

² **SECONDARY EVIDENCE.**—The act of 1851, sec. 21, gives to papers properly recorded, the like effect as the originals, but it does not dispense with proof of execution.

IDEM, OFFICIAL CERTIFICATE, WHEN NOT EVIDENCE.—The certificate of a tax-collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence, where the tax-collector himself can be called as a witness.

IDEM, WHEN ADMISSIBLE.—In his absence, his receipt for taxes, with proof of its execution, would be admissible.

APPEAL from the Superior Court of San Francisco.

The complaint stated, that the plaintiffs were minors, under fourteen, who sued by C. R. Bond, their guardian. That on 5th February, 1848, W. J. Powell, their father, was seised and lawfully possessed of the 50 vara lot, No. 102, in the city

¹ See *McMinn v. Whelan*, 27 Cal. 310.

² Cited, *McMinn v. O'Connor*, 27 Cal. 244. See *Mayo v. Maseaux*, 38 Cal. 449.

of San Francisco, (describing it,) and continued in possession thereof up to the time of his death, which occurred on the 6th February, 1848; and that his heirs continued to hold the possession of said lot, until some time in the month of October, 1850, when they were interrupted in the possession and enjoyment thereof by the defendant; who took possession thereof and held the same, and still holds the same, unlawfully, from the plaintiffs, and refuses to deliver the same, to their damage \$1000, and prays judgment. The bill also set out the partition of the estate of W. J. Powell, deceased, which is not material, in the view taken of the case by this Court.

The answer of defendant denies the possession of Powell, the father, and of the plaintiffs, or that they were interrupted in their possession by the defendant, etc.; and answers, that in the month of December, 1849, he entered upon and became lawfully seised and possessed of a portion of said lot, (describing it,) and that he does not claim title to any other portion of the premises. That, at the time when he

[428] entered upon and took possession of *the premises, there was no indication of any act of ownership having been exercised over the same; that he entered peaceably and quietly, without molestation or counter claim from any one; that he enclosed, built upon, and otherwise improved the same, and has continued in peaceable possession thereof, down to the present time; and avers, that if Powell ever was in possession of the premises, such possession was abandoned prior to the entry of defendant; and charges that plaintiffs have no right, title, or interest in the premises, etc., and prays to be dismissed.

In the course of the trial, the plaintiffs offered a paper purporting to be a grant from George Hyde, Alcalde, to W. J. Powell, for lot No. 102, dated 16th December, 1846, which defendant objected to, and it was rejected by the Court.

The plaintiffs then gave testimony, showing that the lot was fenced, in 1847, with a redwood fence, and continued in fence till 1849.

The plaintiffs then offered a paper, purporting to be an agreement between Leidersdorf and Powell, and handed the

same, to the witness, who said: "I know Mr. Buchanan, one of the subscribing witnesses to this instrument. I don't know where he is: he left here some time since. I know nothing about Mr. Poor, the other subscribing witness. I cannot swear that Mr. Buchanan is now absent from this State."

The defendant's counsel objected to the witness proving the signature of Buchanan, as no sufficient foundation had been laid for such proof. The Court overruled the objection, and defendant excepted. The witness proceeded: "I recognize the signature of Buchanan to the paper submitted."

The same objection was made to the proof of the other subscribing witness, which was admitted, and excepted to, as above, and the witness proceeded to say that he knew the other signature to be genuine.

The agreement was then offered, with the certificate of the record of it annexed, and admitted, and exception taken.

Plaintiffs then proved by witnesses, that they had known Mr. Leidersdorf and Dr. Powell; that the lot was fenced in, by Leidersdorf, about 1847; that the fence was taken away in the winter of 1849 and 1850, by people who pitched tents upon the *lot; that the squatters came on the lot [429] about 1849 or '50; that Leidersdorf had said he had fenced the lot, under an agreement with Dr. Powell. This was proved by one who acted as agent of Powell. Defendant excepted. He (the agent) requested the squatters on the lot in 1850 to pay rent, and stated if they did not they would have to move away; that the property belonged to Dr. Powell. Witness acted as agent eighteen months. The persons on the land all said they would pay rent, except Tyson, if satisfied that the title was in Powell.

The plaintiffs then offered the certificate of the tax-collector, to show that plaintiffs had paid taxes on the property down to the present time. Defendant objected, and excepted. Plaintiffs closed, and defendant here asked for a nonsuit, which the Court refused.

He then offered evidence, to show that the lot was not fenced in 1849; that it was in a wild state, covered with bushes; that defendant went there in the beginning of 1849. Some stumps of posts were on one side of the lot 102.

The agreement between Powell and Leidersdorf, the proof of which was excepted to as above, is dated 27th February, 1847, and was an agreement on the part of Powell to sell and convey to Leidersdorf all his right, title, and interest, in one half of lots, Nos. 99 and 102, on consideration that the said Leidersdorf should enclose the same with a suitable fence, and erect houses thereon according to law.

The jury to whom the case was submitted found for the plaintiffs; for whom judgment was entered accordingly, and defendant appealed, the Court having refused a new trial.

The case in this Court was decided on the exceptions taken to the evidence.

Lent, for Appellants.

The agreement between Powell and Leidersdorf was admitted without due proof of its execution. (1 Greenl. Eq., secs. 569, 572, 574; Stat. of Cal. 1850, p. 250, sec. 10.)

The proof of Leidersdorf's declaration was illegally admitted. (1 Greenl. Eq., sec. 124.)

The certificate of the tax-collector was improperly admitted. (1 Greenl. Eq. 498.)

[430] *Upon excluding these proofs, there is nothing to sustain the verdict.

Rhodes, for Respondent.

The agreement with Leidersdorf was properly admitted under the statute, which admits the original after it has been recorded, and the record is made in evidence. (Stats. vol. ii., p. 122, sec. 447.)

Copies certified from the record shall be received in evidence with the like effect as the original instrument. (Stats. vol. ii., p. 204, sec. 21; and see Stats. vol. i., p. 81, sec. 39; Act of February 28th, 1850; and vol. i., p. 218, sec. 1 and 2; Act of April 13th, 1850.)

HEYDENFELDT, Justice, delivered the opinion of the Court.
WELLS, Justice, concurred.

The execution of the agreement between Powell and Leidersdorf was not properly proved. The proper predicate to

the truth of the handwriting of a subscribing witness is to show that the witness is beyond the jurisdiction of the Court, or to have the same inferred from failure to find him after diligent inquiry.

The introduction of a copy from the record in the Recorder's office does not cure this defective evidence.

The act of 1851, p. 204, sec. 21, cited by the plaintiff's counsel, gives to copies of properly recorded papers "the like effect" as the originals. But it does not make the copy superior to the original, so as to dispense with proof of execution.

The certificate of the tax-collector was also improperly admitted.

If the payment of taxes was sought to be proved, in order to show that there was no abandonment of the premises, the evidence of the collector himself would be the best, and in his absence, his receipt for the taxes, with proof of its execution, would be admissible.

The declarations of Leidersdorf to Gillespie were likewise inadmissible. For these reasons, the judgment is reversed, and the cause remanded

***J. B. L. MONTIFIORI & G. T. BURGOYNE, Ap- [431]**
pellants, v. ARNOLD ENGELS, A. J. HOOPER,
G. GORDON, and J. SMITH, Respondents.

REFERENCE, REPORT OF REFEREE CONSTRUED.—A case was submitted to a referee to find the interest of R., and the value of such interest, in a vessel and cargo. He found such interest and value in the ship, but not in the cargo, and reported that he was unable, for want of evidence, to find the value of R.'s interest in the cargo. *Held*, that this was equivalent, for the purpose of legal adjudication, to finding no value whatever.

ARBITRATION, EFFECT OF SUBMISSION.—When parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award.

AMENDMENT, AFTER APPEAL.—The case sent back, with leave to plaintiff to amend his declaration, and to the defendant to answer over.

APPEAL from the Superior Court of San Francisco.

The complaint in this case set forth an agreement between the plaintiffs and defendants, reciting a suit in the Superior Court of San Francisco, in which J. B. L. Montifiori and G. T. Burgoyne were plaintiffs, and Lewis Reford was defendant, in which the plaintiffs had caused all the right, title, and interest of defendants in and to the ship *Thracian* and her cargo, to be attached, and claim that defendants have an interest in the whole of the same, which the undermentioned parties (the defendants) deny; but for the determination of Reford's interest, the parties had, by a separate instrument, agreed to submit the same to the decision of T. W. Sloan, Esq., and if it should be determined that defendant (Reford) had any interest in the said ship and cargo, or any portion thereof at the time of the seizure, then they (the defendants) agree to pay the said plaintiffs the amount of any judgment they may obtain against the said defendant, not exceeding the extent and value of his interest therein, so to be determined by said Sloan; and in consideration of said agreement, the plaintiffs agree to release the ship and cargo from the said process. The agreement then sets forth a stipulation on the part of the defendants in this action, in consideration of the release of the ship and cargo from the attachment, that they will pay to plaintiffs the amount of any judgment they may obtain [432] against *the defendant, Reford, not exceeding his interest in the ship and cargo, if the decision of said Sloan shall be that he had any interest therein subject to said attachment, and all costs.

The complaint then avers that the defendants (the parties to the recited agreement) consented to the reference to Sloan, and appeared before him, and adduced testimony, etc., to prove that said Reford had no interest in the said vessel or cargo, subject to the said attachment. And said Sloan, after hearing, etc., made his report, that on the 3d August, 1852, Lewis Reford and Thomas C. Thomas, became joint-owners of the ship *Thracian*, by purchase from C. Cushman & Co., for \$5000; that on the 31st Jan., 1853, (when the attachment issued,) she was worth \$10,000. That the said Thomas and

Reford, on the 13th Sept., 1852, had despatched the said ship to Puget's Sound for a cargo of lumber, the cargo to be sold on joint account; that prior to August 16, Thomas had advanced \$2500, and Reford had advanced \$5000, on the same account. That she arrived with a cargo at San Francisco, January 29th, 1853. That the said cargo was purchased by said Thomas & Reford, at Puget's Sound, for \$5000. That on the 7th October, 1852, Thomas agreed to sell, within two months, to the Pacific Mail Steamship Company and others, a quantity of lumber at a certain price, but on the 31st January, when the attachment was laid, there had been no actual sale, so as to vest the same in the said parties. The referee therefore finds that on the 31st January, when the attachment was laid, Reford was half owner of the ship, which interest was then of the value of \$5000, and was subject to the said attachment.

That at said time Reford was an equal owner with Thomas in the cargo, subject to the charge of one-half of the expenses of the voyage from San Francisco to Puget's Sound and back, exclusive of the cost of purchasing said lumber, and that such interest of Reford was subject to the said attachment. That forasmuch as said Thomas is not a party to this suit, and cannot under the reference have an account taken of the expenses of the said voyage, properly chargeable upon said cargo, the referee is unable to ascertain and report the exact value of the share of said Reford in said cargo so attached, and avers that judgment was entered on the report and remains in full force.

*The complaint further avers that Thomas had taken [433] no steps to ascertain the amount of the expenses of the said voyage, and plaintiffs aver that there were no expenses incurred which could be legally charged against said Reford, or which he had not defrayed to the extent of his liability, and aver that at the time the attachment was levied, the value of the interest of Reford therein was \$6800.

The complaint contains further averments in relation to details that arose in the course of the transaction, which were objected to for alleged defects in pleading; but as the opinion of this Court was confined to a single objection taken to the report of the referee, it is unnecessary to report them.

The defendants demurred, assigning several grounds, of which the 9th was the only one considered in this Court, and which is as follows:

"It does not appear that the said Sloan has ever made any final decision or report of the matter referred to him to decide and report, and that no decision has ever been made final and complete."

The demurrer was sustained, and plaintiffs appealed.

Barrett and Gorham, for Appellants.

Hackett and Judah, with *Doyle*, for Respondents.

The report of Sloan, the referee, is not final, as it fails to report the value of Reford's interest in the cargo, which was one of the matters submitted.

The referee was to ascertain the value of Reford's interest in the ship and cargo, as giving the penalty and extent of defendants' obligation.

Finding that his interest in the cargo was one-half, subject to the undefined charges of a voyage to Puget Sound and back, the value of which interest the referee says he cannot determine. This interest in the cargo was one of the two things submitted, and this is not determined. Awards required to be certain. (2 Caine, 235; 12 Met. 31; 5 Blackf. 128; 3 Scam. 428; 9 Wend. 164; 7 East, 81; 7 D. & E. 73; 11 S. & M. 616; 11 East, 188.)

HEYDENFELDT, Justice, delivered the opinion of the Court.

WELLS, Justice, concurred.

[434] *There is but one ground of demurrer which I think proper to consider—the one alleging the incompleteness of the award.

It is urged that the award is not complete, because it was a part of the submission that the referee should find the interest of Reford, and the value of such interest in both the ship and cargo, whereas, he found such interest and value in the ship, and not in the cargo.

The referee reports, however, that he is unable, for want of evidence, to find the value of Reford's interest in the cargo. This certainly does not render the award incomplete,

because it is equivalent, for the purpose of a legal adjudication, to finding no value whatever.

When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. In this case, it was only necessary for the plaintiffs, after having shown Reford to be the owner of one-half the cargo, to have proved the value, and in the absence of anything to the contrary, this would have governed the finding. On the other hand, if the value of the cargo was to be reduced by the expenses of the voyage, it was the duty and interest of the defendants to prove the amount of those expenses.

The material defect in the declaration is the allegation of a right to recover outside of the award, when the stipulation of the defendants is substantially and only to abide the award. This, however, has not been alleged as one of the grounds of demurrer, and therefore cannot avail the defendants. The grounds of demurrer taken are either technical or otherwise unsubstantial, and therefore no effect will be given them.

The judgment is reversed, and the cause remanded, with leave to the plaintiffs to amend the declaration, and to the defendants to answer over, each party paying half the costs of this Court.

***IRA P. EVANS, Respondent, v. JOSEPH BIDLEMAN et al., Appellants. [435]**

CONSIGNEE AS PARTNER, WHEN INDIVIDUALLY LIABLE.—The plaintiff consigned goods to McL., who sold them and received the proceeds. McL. was the partner of a firm, (and one of the defendants,) which being in want of funds, proposed to another partner, B., (also a defendant,) to loan the money of plaintiff in his hands for the purposes of the firm, to be repaid when funds of the firm could be had; which was consented to, and the money advanced under this arrangement. The firm was sued for the money so loaned. *Held*, that there was no privity between the plaintiff and defendants on which to establish the relation of debtor and creditor. That McL., as agent of plaintiff, had no authority to loan the money to the defendants, and it can only be regarded as an advance by one partner to the partnership concern, for which they are liable to him, and that McL. alone is liable to plaintiff.

APPEAL from the Superior Court of San Francisco.

The complaint stated that the defendants in this case, Bidleman, McLeman, McCoy, and Laffan, were partners, doing business under the name of "The Pacific Brewery and Distillery Company;" that the plaintiff lent the defendants, at their request, divers sums of money, amounting in the whole to \$735 94, of which there were repaid \$100, and the balance, \$635, remained due and unpaid, with interest, etc.

The writ was served upon Bidleman alone, who answered, and denied the partnership, and denied the alleged loan and all indebtedness.

On the trial before a jury, James McLeman was sworn for plaintiff, and testified that he knew the plaintiff, not personally, but by correspondence; that he knew defendants; that they were associated in business, under the firm of "The Pacific Brewery and Distillery;" that he knew of money borrowed by the defendants of the plaintiff, in the fall of 1850, the amount \$735; that defendants are entitled to a credit of \$100 paid.

On cross-examination, the witness said: "I am one of the defendants in this suit, one of the partners. I borrowed this money, with the consent and direction of Mr. Bidleman. I borrowed it of the plaintiff's agent. I was the agent of the plaintiff from whom this money was borrowed. I borrowed it from myself as *such agent. I had funds in my hands, as the proceeds of goods consigned to me by the plaintiff, to be sold, and sold by me for his account. The defendants' firm was in want of money to use and pay off wages. I applied to Bidleman, to whom all the goods manufactured for the company were sent for sale, and who was bound to furnish all funds for disbursements for these purposes. He requested me to wait till after steamer day. I told him I had some funds on hand, the proceeds of the plaintiff's goods consigned to me, and that if I could rely on their being refunded, I would use them for the purpose. He told me to do so, and he would refund or return them. I did use them so, accordingly. The thing thus run along some time, and the money has never been returned. I was not indebted to the firm."

The witness further said that the plaintiff was in the habit of consigning goods to him, and he of remitting the proceeds to plaintiff from sales of his goods as instructed by him, and this was the extent of his agency for plaintiff.

"I directed this suit to be brought as plaintiff's agent. If the money is recovered, it will be paid over to me as plaintiff's agent.

"I kept a bank account at this time in my own name, and deposited in that account all funds, as I received them, that came into my hands as an individual, as distinguished from the said firm." The witness kept the firm accounts and books.

The plaintiff here rested his case, and the defendants asked for a nonsuit, which the Court refused, and instructed the jury to find for the plaintiff for the amount proved, who found for plaintiff \$731 72 and interest; and a new trial being refused, defendants appealed.

Hackett, for Appellants.

McLeman was agent merely as the consignee, and for the sale of the goods of plaintiff, and to remit the amounts received by him. The money received for the goods sold was not the plaintiff's, but his own, and he was debtor to the plaintiff for the amount, and not agent. He deposited the money in his own name, and treated it as his own.

Could the plaintiff have sued the bank for the money deposited? If McLeman had died, who would have had the money—Evans, or his administrator?

*The money, in specie, was not the plaintiff's prop- [437] erty. The agreement with Bidleman was not a loan of money, but an arrangement by which one partner advanced money for the benefit of the firm.

The plaintiff never authorized the loan or directed the suit, and on the trial McLeman appears in the character of agent, partner, plaintiff, defendant, and a witness.

Brooks, Martin, and McCracken, for Respondents. .

McLeman was the agent of Evans, and could not change his character in this respect by depositing Evans's money in bank. It was distinctly shown that the money belonged to

Evans. The test is, was this money the proceeds of Evans's merchandise? McLeman having received it in a fiduciary capacity, could not by his own act change its character. The proof is that the money was not an advance but a loan,

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The Court below erred in overruling the motion for a nonsuit.

There was no privity between the plaintiff and the defendants, on which to establish the relation of debtor and creditor.

The defendant McLeman had no authority as agent of Evans to loan the money in controversy to the defendants, and it can only be regarded as an advance by one partner to the partnership concern, for which they are liable to him; while McLeman alone is liable to the plaintiff.

Judgment reversed.

[438] *TOOMS, Respondent, v. RANDALL, Appellant.

¹ PLACE OF TRIAL, MOTION FOR CHANGE TOO LATE.—Where a motion was made to change the venue, on the ground that neither of the parties resided in the district; where no objection was made in the answer, and after nearly six months had elapsed before the objection was taken: *Held*, that the motion came too late, and was properly rejected.

PLEADING, MATTER IN ABATEMENT.—Matter in abatement, or which was such at common law, (as the motion in this case,) must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary.

APPEAL from the Fourth Judicial District.

This action was brought for the recovery of a promissory note of \$2000, given by defendant to plaintiff; and was commenced on the 10th of July, 1852, in the District Court for the

¹ Cited, *Greenfield v. Steamer Gunnell*, 6 Cal. 68; *Pearkes v. Freer*, 9 Cal. 648; *Sheekles v. Sheekles*, 8 Nev. 406. See *Reyes v. Sanford*, 5 Cal. 117; *Jones v. Frost*, 26 Cal. 246.

county of San Francisco. The defendant answered on the 26th July, 1852, denying the debt, and setting up a counter claim, and concludes thus, "wherefore defendant demands trial, in time and place as the law directs." On the 12th August, 1852, the defendant filed his affidavit, setting forth, that he is now, and has been, for more than two years, resident in the city of Monterey; and that Tooms, the plaintiff, is not a resident of the city of San Francisco, and that neither party resided in the county of San Francisco at the commencement of this action.

On the 8th January both parties appeared. The said affidavit as to residence was read, and the motion to change the place of trial to the county where some of the parties reside, was argued by counsel on both sides. The Court denied the motion, "the answer to the complaint having set out no special objection, because the venue was not laid in the proper county."

On the same day the defendant appealed.

Shaw, for Appellant.

The fact that this was a transitory action did not authorize the plaintiff to lay the venue where neither party resided; and as he was guilty of laches, he cannot complain of defendant for not moving more promptly to change the place of trial to the proper county.

Plaintiff *did not* reside in San Francisco County, and he was *put upon inquiry to learn the residence of de- [439] fendant, by defendant's answer demanding "trial at the time and place, as the law directs."

The statute is express: it prescribes no time when the motion shall be made: it directs that *the case shall be tried in the county in which the parties, or some of them, reside, at the commencement of the action.*

The statute confers a *right*, and parties can only look to that, or to the rules of the Court in relation thereto; and there is no rule prescribing the time within which the motion shall be made. And the law says, when the wrong county is designated, the Court may, (i. e. *shall*,) if the reason shown be not disputed, change the place of trial. To say that, because the

motion was not made in a given time, it should not be allowed, was merely arbitrary and unsustained by law. In New York, special provision as to time is made by statute. See Code, 52, p. 104, sec. 126 (105.)

McAllister, for Respondent.

The notice of the motion to change the venue was made five months after the institution of the action. The term *residence* in the statute has not the same meaning as domicile; and defendant's answer admits "that the nature of his business has detained him in the city of San Francisco for the past few months." Residence may be either permanent or temporary. (2 Kent's Com. 430, n.)

The application came too late, and the Court has a right to deny the motion on that ground alone. That portion of the answer demanding "trial, in time and place as the law directs," constitutes no notice to plaintiff: it is too indefinite, and should set out the proper county in which defendant claimed to have his residence.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

This is an appeal from the refusal of the District Court to change the venue. The application was made on the ground that neither of the parties reside in the district.

[440] *The motion was properly refused. No objection of the kind was made in the answer, and after it was filed, nearly six months were permitted to elapse before it was taken.

By the common law practice, such an objection could only be taken by plea in abatement, before filing a plea in bar, and the latter is always a waiver of all matter in abatement.

The same strictness must be adopted here relatively to our form of practice, because the principle prevails here, as well as elsewhere, that the law abhors a dilatory plea. Matter in abatement, or what was such at common law, must therefore be set up in the answer, and with such particularity as to exclude every conclusion to the contrary.

Order affirmed.

LOUISA TENDESEN, Appellant, v. B. T. MARSHALL,
Respondent.

PLEADING, TRESPASS AND DAMAGES UNITED.—In a complaint for trespass, the plaintiff claimed \$500, the alleged value of the property destroyed, and \$500 damages; defendant demurred on the ground that two causes of action were improperly joined; and the Court below sustained the demurrer. *Held*, that this was error.

APPEAL from the District Court of the Fifth Judicial District.

MURRAY, Chief Justice, delivered the opinion of the Court.
HEYDENFELDT, Justice, concurred.

The plaintiff filed her complaint in the Court below for trespass against the defendant, and prayed a verdict for \$500, the alleged value of the property destroyed, and \$500 damages.

The defendant demurred, on the ground that two causes of action were improperly united. The demurrer was sustained, from which the plaintiff appeals.

The declaration contains but one count. It simply asks for the value of the property destroyed, and for damages, which the jury had the right to give, if they thought proper. The demurrer should have been overruled.

Judgment reversed.

*BUCKLEY, Respondent, v. MANIFE & RUN- [441]
NELLS, Appellants.

¹ **WITNESS, COMPETENCY OF.**—Under the statute, a defendant cannot be a witness for his codefendant, where the defence is general, and would operate in discharge of both.

IDEM.—And the rule is the same where but one defendant is upon trial, the other not having been served with process in time.

¹ See *Johnson v. Henderson*, ante 368; *Sparks v. Kohler*, ante 299.

COHAS, Appellant, v. RAISIN and LEGRIS, Respondents.

MEXICAN LAW, TOWNS OWNERS OF LANDS.—By the laws of Mexico, towns were invested with the ownership of lands.

¹ **ALCALDE POWER TO MAKE GRANTS.**—By the laws, usage, and custom of Mexico, the Alcaldes were the heads of the Ayuntamientos, or town councils; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns.

² **SAN FRANCISCO, TITLE TO PUEBLO LANDS.**—Before the military occupation of California by the army of the United States, San Francisco was a Mexican Pueblo, or municipal corporation, and was invested with title to the lands within her boundaries.

ALCALDE GRANTS, PRESUMPTIONS.—A grant of a lot in San Francisco, made by an Alcalde, whether a Mexican or of any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the Pueblo.

PUEBLO LANDS.—Under the Mexican laws, municipal lands become the absolute property of the Pueblo, subject only in their disposition to the general laws of Mexico.

³ **IDEM, RIGHTS OF SAN FRANCISCO IN.**—The occupation and subsequent acquisition of California by the United States did not suspend or determine any rights or interest of San Francisco in such lands. And if any interest passed to the Government of the United States by the said acquisition, it has been reconveyed by the Act of Congress of March 3d, 1851, entitled, "An Act to Ascertain and Settle the Private Land Claims in California."

ALCALDE, VALIDITY OF ACTS OF.—It is too late to question the authority of an Alcalde elected in 1846. If invalid, his acts as a *de facto* officer must be held good by this Court.

ALCALDE GRANTS, RIGHTS UNDER.—The title acquired by San Francisco, by virtue of the Act of Congress of March 3d, 1851, to the Pueblo lands, must enure to the benefit of *bona fide* holders under her grants.

STARE DECISIS, CASE OVERRULED.—The case of Woodworth v. Fulton is not law, and can be no further regarded as authority. There is no principle which compels the observance of the doctrine of *stare decisis*, when a rule well settled and universally acquiesced in has been violated.

⁴ **PUEBLO, RIGHTS OF, TO MUNICIPAL LANDS.**—The Pueblo retained, during the war, all its rights to municipal lands which had been conferred upon it previous to the war. The right to alienate is incident to that of ownership. The fact that [444] this right was exercised by the municipality *from 1835 to 1850 without question or restriction, would prove the usage and custom in the absence of law.

¹ Referred to, Treadwell v. Payne, 15 Cal. 498. Cited, Redding v. White, 27 Cal. 285. Validity of grant by Alcalde, Hart v. Burnett, 15 Cal. 558, 569. Approved, White v. Moses, 21 Cal. 40; U. S. v. Vallejo, 1 Black, 562; 9 Wall. 602.

² Cited, Seale v. Mitchell, 5 Cal. 402; Hart v. Burnett, 15 Cal. 617. See 12 Wall. 319.

³ Construed, Welch v. Sullivan, 8 Cal. 187, 199; Hart v. Burnett, 15 Cal. 589. Case affirmed, Dewey v. Lambier, 7 Cal. 348.

⁴ Cited, Touchard v. Touchard, 5 Cal. 307.

IDEM.—The Pueblo had the same right to dispose of its property during the war as a natural person.

ALCALDE GRANTS.—All grants made by the Alcalde from the beginning of 1835 to near the end of 1839 were made by the authority of the Ayuntamiento.

GRANTS BY JUSTICES OF PEACE.—The grants made by Justices of the Peace from 1839 to the end of 1843, were made by virtue of authority conferred on them in the absence of Alcaldes by the Departmental Junta, in virtue of Art. 180 of the law of March 17, 1837.

PUEBLO GRANTS.—The grants made in 1844 by Alcaldes were made by virtue of their office, as constituting the municipal government of this Pueblo, under Governor Micheltoreno's Proclamation of November 4th, 1843.

IDEM, PRESUMED, MADE BY AUTHORITY.—Grants made after the 15th September, 1847, must be *presumed* to be made by the authority of the Ayuntamiento, or Council, so long as that body existed.

APPEAL from the Superior Court of San Francisco.

The complaint in this case set forth that on the 12th December, 1850, plaintiff executed a bond in favor of Lewis Legris and R. Laranchy, for \$3000, conditioned, that if said Legris and Laranchy should pay to plaintiff the sum of \$3000, evidenced by certain promissory notes drawn by said Legris and Laranchy to the order of plaintiff, (describing the notes,) plaintiff would execute and deliver to the said L. and L., at their request and expense, a good and sufficient warranty title to a piece of ground, part of lot 233 on the map of the city, etc., describing it, and thereupon said obligation should become void, otherwise in force. And if any of the notes described should not be paid on the day of their maturity, then the obligor, without further proceedings, should take back the property free of all charges. That, on the 1st March, 1851, said Laranchy assigned the said bond to Jules Raisin, and the said Raisin and said Legris are now in possession of said property. That three notes, of \$300 each, due the 15th June, July, and August, have not been paid, though demanded, etc. Wherefore, plaintiff prays for judgment against defendants, ordering that said property be *restituted* to him, free of costs, etc.

The defendant, Jules Raisin, answers and admits the allegations of the complaint, and the non-payment of the notes as charged. And avers that he is not bound to pay them, for that *since the payment of the \$1400 (the money [445] admitted to be paid by the complaint) he discovered

that plaintiff had no title to the premises, pretended by the bond to be sold, and cannot comply with his said covenant to execute a good warranty title for the same, which is a fraud on defendants, who therefore pray that the contract be rescinded, and for judgment for \$1400, already paid by defendants, with interest, etc., and for general relief.

Sept. 15, 1851. The counsel in the case filed an agreement, in which it is admitted that at the date of the bond the plaintiff was in peaceable possession of the lot, that ever since the date of the bond the defendants have been in peaceable possession, have never been disturbed in any manner whatsoever, and that the bakery (on the lot) is at this time in full operation.

It was also agreed that plaintiff in this case claims under a grant executed by an American Alcalde, in 1847, when the United States was at war with Mexico.

The cause was heard by the Court below, September, 1851, who decreed that the contract be rescinded, and that judgment for \$628 19 and costs be entered for defendants. Upon the payment of which, by the plaintiff, the defendants are hereby ordered to deliver up to the plaintiff the lot of ground and improvements described in the complaint, and that plaintiff have his writ of possession, etc.

The plaintiff appealed.

Hubert, for Appellant.

There is no breach of warranty unless there is an actual ouster or eviction. (4 Kent's Com. 471.) Defendant in possession under plaintiff's title is estopped from questioning it. (1 Cal. Rep. 120.) The covenant that plaintiff will execute a good warranty title, refers to the deed itself, and not to the title of the property. (20 Johns. 129.)

Hepburn, for Respondent.

HEYDENFELDT, Justice, delivered the opinion of the Court, with which WELLS, Justice, and MURRAY, Chief Justice, concurred.

[446] *The plaintiff sued on a note which was given for part of the purchase-money of a lot. The sale of the

lot was by warrantee. The defendants set up that the plaintiff has no title, and therefore cannot comply with his warrantee, and they pray a rescission of the contract. It is admitted on the record that the plaintiff derives title from the grant of an American Alcalde, which was made during the war between Mexico and the United States. This involves the consideration, whether, under the Mexican domination, towns were invested with property in lands, whether Alcaldes of towns had power to grant, and if so, whether the qualifications of the officer, and the circumstances of the country at the time of the grant, will affect its validity.

The laws of Spain fully recognize the right of cities, towns, and villages, to acquire and dispose of real estate, subject to the royal regulations, which were made from time to time for their government. And when once acquired, neither the King nor his officers can take away or grant to others any of these municipal lands. "Our will and pleasure is, that cities, towns, and villages shall retain their rights, revenues, and municipal lands, (propios,) and that no grants be made of them, and we command that all grants of the same, or any part thereof which we may make to any person, be of no value whatever." (Novissima Recopilacion, Lib. vii. Tit. 16, Law 1.) In Law 2 of same title and book, the King directs that all municipal lots occupied by any person, without paying an equivalent or rent, be forthwith returned to said cities, towns, and villages. "And if any charters or grants of this property have been made by the King's own ancestors, or by ourselves, we further command that they be of no value, and that they be neither obeyed nor fulfilled."

The manner of granting municipal lands to towns, and the manner in which they were allowed to rent or dispose of them, depended on royal regulations, which were changed from time to time. At one period they could grant or sell them, and at another, they could only lease them, either for a term of years or for ever, the rents forming a fund for municipal expenses. But these grants, sales, and leases were always made by the municipal authorities, with the permission of the Crown, but neither the King nor the Crown officers could themselves dispose of the lands *once granted or acquired [447]

by the towns. In forming new towns, the viceroys were directed not only to make out to them common lands, but also to give municipal lands (propios) to those who had none, "the proceeds of which will serve to pay the corregidores." (Recopilacion, Lib. iv., Tit. 7, Law 14.) In some of these orders and decrees, the municipal authorities were allowed to alienate the municipal domains only in case such measures were necessary for the good of the towns; in others, they were forbidden to sell, and directed to lease only.

At one time, these towns were governed by Cabiladores, at others by Corregidores, and again by Ayuntamientos, composed of Alcaldes and Regidores. At the same time, the municipal government of different towns varied from one another.

On the founding of new towns in California, the population being too small to authorize Ayuntamientos, the granting of town lots was confided to the governors, the commandants, and to the captains of Presidios. (*Vide* Orders and Regulations of 1773, 1779, and 1791; En. Doc. 1850, pp. 133, 135, and 139.)

In 1812 and 1813, the Cortes authorized the establishment of Ayuntamientos in towns which had not before had that right: they also authorized the municipal lands, (propios,) as well as royal lands, (realengos,) "be reduced to private ownership."

The grant of lots in Pueblos were to be made by the "*Ayuntamientos Constitucionales* of the Pueblos to which the land belonged." All grants made were to be *in full property*. (Law of Jan. 4th, 1813, sec. ix.; *vide* *Leges Vigentes*, p. 58.)

Other laws fixed the organization of these Ayuntamientos according to the population of the towns, but in all cases, the First Alcalde was the presiding and executive officer of the municipal council. In the colonization law of 1824, it is expressly stated that the "objects of this law are the lands of the nation, which are not private property, nor belong to any corporation or Pueblo, and can therefore be colonized;" thus fully recognizing the right of ownership in the Pueblos to the land acquired by them, either by grant or purchase.

On the 6th of August, 1834, the Territorial Deputation of California authorized Ayuntamientos of towns to apply for *(egidos) common lands, and (propios) municipal [448] lands, to be assigned to each Pueblo.

"Art. 2. The lands assigned to each Pueblo, for municipal lands, (propios,) shall be subdivided into middling sized and small portions, and may be rented out or given at public auction, subject to an enphitritic rent, or ground tax," etc.

"Art. 3. For the grant of a house lot, for building on, the parties shall pay six dollars and two reals, for a lot of 100 varas square," etc. (En. Doc. 1850, p. 123.) By the law of August 9th, 1834, Art. 5th, municipal lands were to be granted to the new Pueblos, formed out of the secularized missions. (P. 150.)

On the 3d of November, 1834, the Territorial Deputation of California decreed that the Governor should direct the election of an Ayuntamiento in the Partido of San Francisco, to be composed of one Alcalde, two Regidors, and one Sindico. This Ayuntamiento was directed to mark out in the shortest time the boundaries or limits of its municipality. (The original of this decree is of record in the Surveyor-General's office, and the original order of the government in the Alcalde's records. It is translated in Wheeler's Land Titles, p. 12.)

The Ayuntamiento was elected in December, 1834, as shown by the records; and it must be *presumed* that the Ayuntamiento did its duty in marking out the boundaries as directed, especially as they immediately commenced making grants of the lands. (5 Cranch, 234; 3 Wheat. 594; 3 Pet. 320.)

The first grants made by the Alcalde in 1845 were lots 100 varas square, as authorized by the law of August 6th, 1834; but in the same year, José Joachim Estudillo applied to the Governor for a grant of 200 varas square. This petition was referred by the Territorial Deputation to the committee on municipal lands, which reported that the grants of house lots ought to be limited to 100 varas square.

In reply to this petition of Estudillo, which had been forwarded by the Alcalde, the Governor wrote to the Alcalde that

Ayuntamientos had power to grant lots of 100 varas square, at not less than 200 varas from the seashore; and to inform the people of this Pueblo not to apply to the Governor [449] for grants, *but to the Ayuntamiento, to whom that power belonged. The original proceedings in this case are of record in the Surveyor-General's office.

By the former laws of Spain, by the usages and customs of the country, (and by special law of March 17th, 1837,) the Alcalde presided over the Ayuntamiento, and was the executive officer to carry into effect its resolutions and orders.

Hence, all grants of lots made in San Francisco, from the beginning of 1835 to the latter part of 1839, were made and signed by the Alcalde—he being the first member, president, and executive officer, of the Ayuntamiento. Some of his grants read: “By virtue of the authority in me vested, by the most illustrious Ayuntamiento, I hereby grant,” etc., others simply, “By virtue of authority in me vested, I hereby grant,” etc.

In 1839, it was thought by the Governor that the number of the population in San Francisco, being greatly reduced by the secularization and partial ruin of the mission, was not sufficient to authorize the maintenance of an Ayuntamiento, and *Jueces de Paz* were elected in place of that body, as directed in the law of March 17th, 1837.

These *Jueces de Paz* commenced making grants of 100 vara lots in the same manner as had been done by the Alcaldes. But a question now arose whether the Justices could, under the law of 1837, (*vide* acts 180–186,) exercise that power in place of the Alcalde, without a special ordinance of the Departmental Junta. To remove this doubt, a special ordinance was passed, and communicated by the Governor through the Prefect, but limiting the grants of a Justice to 50 varas square. (The original of this communication is in the archives, and bears an earlier date than the letter of the Sub-Prefect, printed by Wheeler, p. 15.)

The grants made by the Justices of the Peace at this period are generally, “By virtue of the superior order of the Departmental Government, I hereby grant,” etc.

In November, 1843, Governor Micheltorena, clothed with

the extraordinary powers conferred on him by the President under the Bases of Tacubaya, changed the municipal organization of San Francisco, and directed the election of Alcaldes, of first and second nomination.

*These Alcaldes not only took the place of the former Ayuntamientos, but exercised all the powers conferred on the Prefects. [450]

This municipal organization continued to the time of the military occupation of the country by the United States. Hence, the grants made from the beginning of 1844 are made in the name of, and signed by, the "Alcalde." It is true that, in 1846, the Alcaldes sometimes signed themselves as *Juez de Paz*, but he was elected as *Alcalde*, and addressed as *Alcalde* in all official communications of the Governor.

In places where there was an Alcalde, the powers of a *Juez de Paz* were limited to matters of police, and the trial of petty offences, etc.

The forces of the United States took possession of Monterey on the 7th day of July, 1846, and subsequently of the other portions of Upper California.

The President of the United States directed the officers taking possession of Upper California to organize a civil government, and advised that "it would be wise and prudent to continue in their employment all such of the existing officers as are known to be friendly to the United States."

In accordance with this authority, and in the absence of the Mexican Alcaldes, who had left their posts, a new election was called in San Francisco on the 15th of September, 1846. At this election, an American was elected First Alcalde, and a Mexican was elected Second Alcalde.

These offices continued to be filled by elections, or in case of temporary vacancies, by executive appointments, until the organization of the State government and repeal of the Mexican laws. In 1847, the increase of population was deemed sufficient to authorize an election of Regidors, or councilmen, which took place on the 15th of September. This body also continued with new elections, until the charter of 1850 of the city of San Francisco.

From this summary, we must infer;

1st. That all grants made by the Alcalde, from the beginning of 1835 to near the end of 1839, were made by the authority of the Ayuntamiento.

2d. That the grants made by Justices of the Peace, from 1839 to 1843, were made by virtue of authority con-[451] ferred on *them, in the absence of Alcaldes, by the Departmental Junta, in virtue of Art. 180 of the Law of March 17th, 1837.

3d. That the grants made in 1844, '45, '46, and beginning of 1847, by Alcaldes, were made by virtue of their office, as constituting the municipal government of this Pueblo, under Governor Micheltorena's Proclamation of November 14, 1843.

4th. That grants made by Alcaldes after the 15th of September, 1847, must be presumed to be made by the authority of the Ayuntamiento or council, so long as that body existed.

I now come to the particular consideration of the effect of grants made after the military occupation of this country by the forces of the United States. The defendant considers this as an adjudicated question, and cites the case of *Woodworth v. Fulton*, 1 Cal. 295, as decisive. Such would certainly be the case, if we were to consider ourselves bound by that decision. But, however great is my regard for the doctrine of *stare decisis*, there is certainly no principle which compels its observance where a rule well settled and universally acquiesced in has been violated.

In that case, as affecting the present question, the Court assumed:

1st. That San Francisco was not a Pueblo.

2d. That, conceding it to be a Pueblo, there was no legislation, general or special, which vested in it the title to land.

3d. That if the title to land was vested in it, then the Alcalde, who was an alien enemy to Mexico, and without authority from the American government, had no power or right to interfere with that vested estate.

In the subsequent case of *Reynolds v. West*, 1 Cal. 323, the opinion was given by the same Judges who decided *Woodworth v. Fulton*. The question was as to the validity of a grant in San Francisco by a Mexican Alcalde before the war. The title was sustained, and of course operated as an aban-

donment by the Court of the first two grounds I have stated, as taken in the case of *Woodworth v. Fulton*.

I have shown before, in this opinion, that Mexican towns were invested with property in lands; that by the Mexican decrees providing for the secularization of the missions, it is shown that *San Francisco was a mission; [452] that the missions were required to be converted into Pueblos. That by the law of August 9th, Art. 5, municipal lands were to be granted to the new Pueblos formed out of the secularized missions; and the direction, in 1834, of the Territorial Legislature for the formation of an Ayuntamiento of San Francisco, with directions to fix its boundaries.

The only question, then, remaining to sustain the decision of *Woodworth v. Fulton* is, that the Alcalde who made the grant was an American and not a Mexican citizen.

It will be remarked, from what has preceded, that these are not grants of any portion of the public domain, made by officers of the conquering power, but are grants of municipal lands made by the regularly authorized municipal authorities, under the laws, usages, and customs of the country, which were not changed or interfered with by the military or *de facto* government organized under the laws of war.

It will not be denied that the Pueblo retained during the war all its rights to municipal lands which had been conferred upon it previous to the war; and as all grants of land made to it must have been in full property, the right to alienate was incident to ownership. The fact that this right was exercised by the municipality, in its different forms, from 1835 to 1850, without question or restriction, would prove the usage and custom in the absence of the law.

The Pueblo had the same right to dispose of its property during the war as a natural person. It is immaterial whether the election or appointment of these municipal officers was legal or not, or whether the individuals possessed the legal qualifications for holding these offices. They were *de facto* the officers of the town, universally acknowledged, recognized, and obeyed as such, and their acts under the law within the sphere of power connected with the office must be binding. The rule of the common law is laid down to be, that

the acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public and third persons are concerned, and neither the title of such officer, nor the validity of his act as such, can be indirectly called in question in a proceeding to which he is not a party.

[453] *The legal presumption is always in favor of his authority. (See *Plymouth v. Painter*, 17 Conn. 585; *Hoagland v. Culvert*, 1 Spenc. 387; *F. & M. Bank v. Chester*, 6 Humph. 458; *Lowell v. Flint*, 20 Me. 401; *Burke v. Elliott*, 4 Ired. 355; *Gilliam v. Reddick*, 4 Ired. 368; *Schleneker v. Risley*, 4 Ill. 483; *Cornish v. Young*, 1 Ash. 153.)

It results from these authorities, and the reasoning upon which they are based, that the doctrine laid down in *Woodworth v. Fulton* is not law, and cannot be any further regarded as authority.

We have come to the conclusion, and so announce as our decision:

1st. That by the laws of Mexico, towns were invested with the ownership of lands.

2d. That by the law, usage, and custom of Mexico, the Alcaldes were the heads of the Ayuntamiento or town councils, were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns.

3d. That before the military occupation of California by the army of the United States, San Francisco was a Mexican Pueblo, or municipal corporation, and was invested with title to the lands within her boundaries.

4th. That a grant of a lot in San Francisco made by an Alcalde, whether a Mexican or of any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the Pueblo.

The judgment is reversed, and the cause remanded.

***HELM, Appellant, v. DUMARS & WILLIAMS, [454]**
Respondents.

JUDGMENT, VALIDITY OF.—A judgment which is right will not be reversed because it is rendered upon a wrong reason.

CONTRACT, CONSTRUCTION OF, SALE WHEN ABSOLUTE.—Fuller purchased some yokes of oxen of Helm, the appellant, for \$1000, paid \$200 down, and gave his note, with C. as surety, for the balance. C. signed the note on the express condition that title to the oxen was to remain in Helm till they were fully paid for. Fuller was to have the absolute use of them. The oxen were placed in the hands of a brother of Helm, who was in the employ of Fuller, as a driver, with the intention of securing the title in Helm. The defendant, a constable, levied upon and sold the oxen, thus situated, as the property of Fuller. *Held*, that the sale by Helm to Fuller was absolute, and that Fuller had such a right of property in them as was subject to execution. That Helm retained no effective lien upon the property. There was no agreement in writing to that effect, nor did Helm, as mortgagee, retain possession; but it was under the control and direction of Fuller. The legal consequences of this condition of things cannot be evaded by showing that the property was in the possession of Fuller's hired servant as agent or trustee.

APPEAL from the District Court of the Tenth Judicial District.

This action was brought for the recovery of three yoke of oxen, or their value, which the plaintiff laid at \$800.

The facts as found by the Court, to whom the case was submitted without a jury, are substantially as follows:

On the 24th March last, the plaintiff sold to one Fuller a lot of oxen for \$1000, \$200 of which were paid down, and Fuller with one Craig as surety gave their note for the remaining \$800. The plaintiff, at the request of Craig, and by consent of Fuller, proposed to retain a lien on the oxen sold until they were paid for by Fuller, and in view of this, it was agreed that they should be placed in possession of James Helm, a brother of plaintiff, but they were to be used by the latter for any and all purposes that the purchaser, Fuller, might require in and about his business. Fuller gave James employment as driver of the oxen, and paid him wages at the rate of \$3 per day during the time. Before the oxen were paid for, on the 8th April following, the *defendant [455] Williams sued out an attachment against Fuller, which he placed in the hands of the defendant Dumars, a constable of the township, who levied on the oxen as the property of

Fuller. On the 11th April, the plaintiff gave notice to Dumars, who then had the property in his custody, as an officer, that he owned them, and demanded possession of them. On the receipt of this notice, Dumars summoned a jury under the statute to try the validity of the plaintiff's right of property, who rendered a verdict against the plaintiff, and Dumars proceeded to sell. The plaintiff upon the finding of the jury brought this suit to recover the property; making Dumars, the constable, and the plaintiff in the execution, defendants.

The Court also found that the note made by Fuller and Craig had been negotiated. That Craig signed the note on the express condition that the title to the oxen was to remain in Helm, the plaintiff, until they were fully paid for, and that this was assented to by Fuller at the time. That at the time of the levy of the attachment the title was in Helm, that is, so far as Fuller and he were concerned, the oxen not having been paid for; and that the proof was that they were worth \$800.

On these facts the Court held the law to be:

That the verdict of the jury who tried the right of property was not conclusive as to the right, except so far as to govern the officer in retaining the levy or making sale.

That the finding of the jury protected the officer in making the levy. That if the jury had found *for* instead of against the claimant, the officer would not have been bound to proceed further without indemnity from the plaintiff in the execution. That there being no proof that the plaintiff in the execution at any time interfered with, or directed the officer in making the levy, he is not responsible for his act. Nor does it appear that he purchased the property, or that he ever had it in his possession. But if the plaintiff in the execution had directed the levy, the officer would still be responsible, if he levied on property of another wrongfully. He is not bound to obey such direction. He must protect himself in the manner prescribed by the statute.

Judgment ordered for defendant with costs. Plaintiff appealed.

[456] **Sawyer, for Appellant.*

The Court found that the oxen were in possession of defendant, and sitting as a jury, having found the plaintiff entitled to them, refused to give judgment for plaintiff, on the ground that the trial of the validity of the claim by the constable's jury, summoned under the 218th sec. of the Practice Act, although it did not determine the title, was still a legal justification to the constable in a suit against him by the lawful owner. Such verdict affords no protection to an officer. It may be used in mitigation of damages, or to protect him in a suit, for a false return of *nulla bona*, where the verdict is for plaintiff, but can, in no respect, affect the rights of the real owner. (10 Johns. 98; 3 J. J. Marsh. 121; 15 Johns. 147; 4 Scam. 550; 3 U. S. Dig. 437, sec. 243.)

The execution commands the officer to make the money out of defendant's property. If he seizes that of any other person he does it at his peril: he is a trespasser, and liable as any other wrongdoer. (7 Con. 735; 14 Mass. 181; 2 Pick. 121; 1 Mass. 530; 17 do. 244; 3 Iredell, 549; 2 Shipley, 312; 3 do. 185; 6 Bar.; Sup. Ct. R. 79; 10 Wend. 349.)

On a naked sale, with delivery of a chattel, at a fixed price, to be paid on a certain day, but till paid, the title to remain in the seller, payment is a condition precedent, and until performance, the property does not vest in the buyer. (See Chit. on Cont. 391 n., and authorities cited.)

There was no delivery to Fuller in this case, the oxen having been placed by plaintiff in the possession of his brother James, to retain as his agent until paid for in full by Fuller.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

Some of the conclusions of law attained by the Court below may properly be complained of as erroneous, but a judgment which is right will not be reversed, because it was rendered upon a wrong reason.

From the facts found, the plaintiff made an absolute sale of the property to Fuller, with such a right of property as was subject to execution.

*If the plaintiff intended to retain any lien upon [457] the property to secure the balance of the purchase-

bills of lading, on the way from France, one of which was the duplicate of the plaintiff's goods. The understanding was that the defendants should hold these securities till Hugens Brothers could place securities of their own in lieu of them. At the time the pledge was made to defendants, they were told by Hugens Brothers that the goods mentioned in the bill of lading of one vessel, (the *Salome*,) belonged to the plaintiff, and that they had no interest in, or lien upon it; that plaintiff was in no way indebted to them. At the time Hugens Brothers showed to the defendants the letters of instruction of the plaintiff (Exhibit 2.) Some time after the pledge above mentioned, Hugens Brothers placed in the hands of defendants a large consignment of goods, that arrived by the ship *Julius*; which they agreed to receive in place of the bills of lading pledged as above.

[460] *This consignment was received by defendants as a full payment of all the indebtedness of Hugens Brothers. A short time after this, the ship *Salome* arrived, and defendants were requested to hand over the bill of lading, or give a permit to land the plaintiff's goods. They positively refused to do either, and insisted on holding the goods until the merchandise of the *Julius* was sold, and their account with Hugens Brothers was closed.

At the time of the demand and refusal, plaintiff's goods were worth \$4500 or \$5000; the sardines alone were sold for \$3500 by Hugens Brothers, but could not be delivered to the purchaser, owing to the refusal of defendants to deliver them. The defendants had exclusive control of the goods, and they afterwards sold the greater part thereof. By the account of sales made, and from the evidence of defendants' clerk, it appeared that the sardines and peas sold for \$3112 92.

Defendants' counsel moved for a nonsuit, on the ground that the proof did not support the complaint. The motion was overruled, and exception taken.

The defendants then proved that the white gum, cloves, and one case of preserved peas, were burned in the fire of May, 1851, and that they had paid duties and custom-house charges on the goods, to the amount of \$910 50. Plaintiff's counsel contended that their charges could not be proved under the

pleadings. The Court admitted the proof, and plaintiff excepted.

Defendants proved that the rate of commission on the sale of goods, in 1850 and 1851, was ten per cent.; which plaintiff objected to, but the Court admitted the proof, and plaintiff excepted.

Defendants offered to give in evidence an account of sales of the goods by the Salome, taken from their books, and offered to produce the books of the firm; which the Court rejected, and defendants' counsel excepted.

The Court charged: That if the jury believed that the goods of plaintiff were pledged by Hugens Brothers, to secure a debt of their own, with knowledge on the part of the defendants, at the time the pledge was made, that the goods belonged to the plaintiff, the plaintiff was entitled to a verdict.

2d. If they found affirmatively on the first proposition, it was for them, exclusively, to say what amount the plaintiff was *entitled to recover; and as to said amount, [461] they were limited only by the \$2500 claimed in the complaint; but in making up the amount they were to leave out the goods destroyed by fire, as the plaintiff waived any claim for them; that they should ascertain what the goods were worth at the time of demand and refusal, or what they sold for, after deducting the expenses and charges set up by defendants, if they should find said charges and expenses true, and render a verdict for said amount, but limited by the amount claimed. Defendants' counsel excepted to the charge, and asked the Court to charge:

1st. That if the goods were delivered by Hugens Brothers to the defendants to be sold by them, and the proceeds of sale placed to the credit of Hugens Brothers, the plaintiff is not entitled to recover. Which the Court refused.

2d. The counsel of defendants argued that the evidence went to support an action *ex delicto*, and that the complaint was for an action *ex contractu*, and asked the Court to instruct the jury that, if they believed the evidence did not sustain the contract as laid in the complaint, the defendants were entitled to a verdict. The Court refused, and defendants excepted.

The jury found for the plaintiff \$2500, and the Court ordered judgment accordingly, with costs, etc. Defendants appealed.

No brief for appellants is on file.

W. H. Sharp, for Respondent.

A factor cannot pledge the goods of his principal for his own debt—(2 Kent's Com., 3d ed., 625; Sto. Agen., sec. 296; 20 Johns. 421)—nor can he do this by endorsement and delivery of the bill of lading (Sto. on Bailment, sec. 225.)

The Court properly refused the nonsuit. The Code of this State only changed the *form*, not the principles, of pleading, as known at common law. (*Dullum v. Gibson*, 3 Code Rep. 153.) One who commits a tort on the goods of another, by which he obtains a benefit, can be charged in assumpsit, as for goods sold, or money received. (2 Greenl. Ev., sec. 108; 10 Mass. 431; *Webb v. Winter*, 1 Cal. 418.) The complaint states the legal effect of facts, instead of the facts themselves, which is all that is required. There is no material [462] variance between the *complaint and the proof. (Chit. on Pleading, 225; 3 Code Rep. 153.)

In proving the *tort* and conversion, the breach of contract is proved, and the fact that defendants received the plaintiff's money supports the complaint. (*Harkins v. Denhour*, A. N. P. 81; 24 Wend. 70.)

Defendants' answer simply denies the complaint. This gave no right to set-off, or to a counter claim. They must make a statement of any new matter constituting a defence. (Prac. Act, sec. 46. See Cal. Rep. 362 and 368.) Defendants cannot claim commissions, that are only given on a faithful performance of all the duties of the whole business. (Sto. Agency, sec. 329, etc.) They denied plaintiff's right, and refused to account, etc. (Ib. 331.)

The value of the property at the time of the conversion is the ordinary rule of damages. The jury has discretion to find its value at a future time. (3 Con. 82; Greenl. Ev. 2, sec. 276.)

Misdirection as to damages will amount to nothing, if the plaintiff has recovered nothing more than justice would give him. (25 Wend. 417. See 3 Johns. 529; 10 Ib. 447.)

The opinion of the Court was delivered by WELLS, Justice, HEYDENFELDT, Justice, concurring.

The first assignment of error is, that the evidence does not support the contract as laid in the complaint, and therefore that the Court erred in refusing to order a nonsuit.

The plaintiff in the Court below waived the *tort*, (if any had been committed,) and brought his action against the defendants as factors, to account for goods sold by them, and to restore the amount of the net proceeds arising from the sale. This he had a right to do, according to well-established principles of the common law, and it was competent for him to introduce evidence showing the manner in which the defendants became possessed of the goods; and although the proof should establish the fact that the defendants became possessed of them wrongfully, it would still be sufficient to maintain an action against the defendants as consignees or factors for the net proceeds.

One of the objects sought by the reformation in the forms of *pleading was to provide for cases like the [463] present. The distinctions in the form of actions *ex delicto* and *ex contractu* are abolished, and one form of action only substituted, and the plaintiff here has brought his action in the form prescribed by the Code; but the principles of law which govern the case remaining unchanged, he introduced testimony to maintain his action as he would have done under the common law system of practice in an action of assumpsit, based upon a similar state of facts; and the Court committed no error in refusing a nonsuit, either on the ground of variance or insufficiency of proof to sustain the complaint.

But the plaintiff having elected to proceed against the defendants as factors, instead of *tort feasors*, he thereby ratified the act of his agents, Hugens Brothers, in transferring the merchandise and the bills of lading into the hands of the defendants, and the defendants, who were commission merchants, as shown by the complaint, must be considered as acting as the authorized consignees and commission merchants of the plaintiff, and entitled to the rights and benefits

arising from this relation. It follows that the plaintiff could only recover from the defendants the net proceeds arising from the sale and disposition of the merchandise, after deducting the necessary charges and disbursements; and the Court erred in admitting proof of the value of the goods at the time of the demand and refusal to deliver.

The defendants are not charged with non-performance or negligence, nor with fraud in the sale, and no cause is shown why they were not entitled to commissions. The strict measure of damages, therefore, was the net proceeds after deducting the necessary charges, disbursements, and commissions; and the Court erred in refusing to admit in evidence the books of defendants' firm to prove the account of the sale of the goods. It was not necessary, as is insisted upon, for the defendants, who were recognized by the plaintiff as factors, and prosecuted as such, to set forth in their answer those charges, disbursements, and commissions, either as new matter, or by way of set-off, to a claim for the net proceeds of the sale. And the Court erred in charging the jury that it was for them exclusively to say what amount the [464] plaintiff was entitled to recover, or that the *defendants were liable for the value of the goods at the time of the demand and refusal. Therefore, in order that these errors may be corrected, the judgment of the Court below is set aside, and a new trial ordered.

[This case was reheard by order of the Court, and the above opinion re-affirmed, December 5th, 1853.]

HERNANDES v. SIMON et al.

DISTRICT COURT HAS NO APPELLATE POWER.—No appellate power belongs to the District Court.

APPEAL from the Third Judicial District.

MURRAY, Chief Justice, delivered the following opinion.
HEYDENFELDT, Justice, concurred.

In this case we affirm the dismissal of the appeal by the District Court, because we have decided that no appellate power belongs to it.

Let the costs of this Court and the District Court abide the event of the suit.

***SETH MAYO, Appellant, v. Z. N. STANSBURY, [465]
Respondent.**

LIEN, OWNER OF CHARTERED VESSEL.—The owner of a chartered vessel has no general lien upon the cargo for the charter price.

JOINT ACTION.—Where a suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action.

APPEAL from the Superior Court of the City of San Francisco.

This action was brought to recover the two equal third parts of 54,581 feet of lumber, which the plaintiff alleged the defendant unlawfully refused to deliver to him, and was about to convert to his own use.

The contract upon which the action was founded is dated 21st November, 1851, and recites as follows:

“Shipped in good order, etc., by Alonzo Leland and Seth Mayo, on board the bark Louisiana, whereof Z. N. Stansbury is master for this voyage, now lying in Columbia River, and bound for San Francisco, 138,455 feet of lumber, marked, etc., to be delivered at the said port unto S. R. & J. N. Pine, they paying freight at \$17 per thousand, with 5 per cent. primage and average, as ascertained.” And the following is endorsed thereon:

“The instrument of the charter-party is the contract between the owner of the bark and said party, and governs them in relation to the sum to be paid to the said owner.

(Signed) “Z. N. STANSBURY.”

The plaintiff owned the undivided two-thirds of the lumber,

and Leland the other third. Leland chartered the vessel. On the arrival of the vessel at San Francisco, a large portion of the lumber was delivered, and part of the freight was paid. There still remained on board the vessel 54,581 feet of the lumber, and there was due of the freight about \$1460. Pine & King, agents of plaintiff and Leland, then offered to pay defendant \$1500 for freight and charges upon the de-[466] livery of the lumber, which *he refused, insisting that he had a lien on the lumber for the money due from Leland on the charter-party. After which plaintiff tendered a little more than two-thirds of the freight-money on the whole quantity of lumber shipped, which defendant refused, and plaintiff then brought this suit for two-thirds of the remaining lumber, and brought his tender into Court.

The Court below held that the lien upon the cargo was not discharged by the charter-party, but was good upon the cargo of Leland to the extent of the freight, as stipulated by the bill of lading.

2d. That one of the joint-owners of a cargo jointly shipped without specification of the shares held by each, could not by tendering his share of the freight, recover the whole of his share of the cargo, "that every part and parcel of the articles described in a bill of lading is liable for the freight-money due on the whole." "Every foot and inch of this lumber was subject to the lien for the balance of the freight due for the whole."

The Court ordered judgment for defendant, and plaintiff appealed.

Platt, for Appellant.

When the property sued for is capable of division, and the rights of parties can be determined with certainty, each owner may sue without joining the other. (Archbold's Pleading, 55, and 57.) The position, that the plaintiff could not demand his share of the lumber until he had paid the whole freight of the cargo, is contrary to all authority. (Paul v. Birch, 2 Atk. 621; Abbott on Shipping, 364, 288; 3 M. & S. 205; 2 Mer. 401; 4 Camp. 298; 18 Johns. 157; 3 Kent's Com. 5 Ed. 220, 221; 6 Pick. 248; Ware, 265, 266; 1 Hull. 375.)

Clarke, Taylor, and Bickle, for Respondent.

The sum tendered and brought into Court only covered two-thirds of the freight.

If plaintiff and Leland were joint-owners and joint-freighters, and the contract was joint, it could not be changed into a several contract at the pleasure of either party.

The freight must be determined by the charter-party. And *it is not denied that defendant had a lien for the [467] freight as against the appellant.

HEYDENFELDT, Justice, delivered the opinion of the Court. WELLS, Justice, concurred.

It is true, as insisted, that the owner of a chartered vessel has no general lien upon the cargo for the chartered price, but this suit is brought upon a bill of lading made to the plaintiff jointly with one Leland. It is clear that the plaintiff has no separate cause of action, and it follows that the judgment must be affirmed. So ordered.

JAMES M. ESTELL, Respondent, *v.* **RICHARD CHENERY** et al., Appellants.

APPEAL, REVERSAL FOR INSUFFICIENT FINDINGS.—Process issued against several defendants, but one of whom appeared: no default was taken as to the others, and a joint judgment was rendered against all. And there being no sufficient finding of the facts and conclusions of law to sustain the judgment, the verdict being general, the judgment was reversed.

APPEAL from the Seventh Judicial District, Solano County.

This was an action for services, alleged by plaintiff to have been rendered by him to defendants, in corraling and separating cattle, for the keep of the cattle, for the use of horses, and the loss of horses incurred in the service so alleged to have been rendered.

The defendant, Chenery, who alone was served with process, denied all and singular the services, all the allegations, and all indebtedness; and set out that he had bought certain

cattle from plaintiff, who was to deliver them free of expense; and the services, if rendered at all, were for plaintiff's own benefit, etc.

There was no evidence returned with the record, and no waiver of a trial by jury is noted, if it was agreed to.

In this state of the record, the following entry appears:

"This action being called for trial, the plaintiff being [468] present, *and the defendant, Chenery, who has heretofore answered, being absent, the Court, after hearing the evidence, and being advised of the law, decides that the defendants are indebted to the said plaintiff in the sum of \$3785; and that said plaintiff ought to recover judgment against the said defendants in that amount. Let judgment be entered accordingly."

From this judgment defendants appealed.

Crockett and Baker, for Appellants.

There was no service, no appearance for any defendant, except Chenery, and the judgment is general against all.

There was no valid waiver of a jury trial by defendants. The Court did not state the facts found, nor state separately the conclusions of law.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The plaintiff commenced his action in the Court below against Chenery and others, as copartners. Service was had on Chenery alone, who answered, denying all the allegations. No default was taken as to the other defendants, and upon the final hearing of the cause, the Court rendered a joint judgment against all.

There is no sufficient finding of the facts and conclusions of law by the Court below to sustain the judgment, the verdict being general.

Judgment reversed, and new trial ordered.

***JOHN M. RHODES, Respondent, v. A. D. PAT- [469]
TERSON, Appellant.**

LIABILITY OF SHERIFF FOR WRONGFUL SEIZURE.—Where an order of Court directed the sheriff to seize certain specific property, and this property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner.

IDEM, REMEDY OF OWNER OF PROPERTY.—The owner of property has his remedy and the right of recovery, against any one, whether sheriff or not, unless it be held by legal process against himself.

APPEAL from the Sixth Judicial District, Sacramento County.

The plaintiff brought this action, to recover of defendant, who was sheriff of Sacramento County, 380 ounces of Henry's quinine, and filed his affidavit, in substance stating, that he, the plaintiff, is owner of the said quinine, which defendant wrongfully detains; that defendant had taken the same as the property of G. W. Rhodes, by virtue of an order directed to him as sheriff, in a suit pending in the District Court, wherein B. F. Penkham is plaintiff, and the said G. W. Rhodes is defendant; that the same was not taken for any tax, etc., under the statute, nor seized in execution or attachment, against the property of the plaintiff.

The plaintiff gave bond and surety for the prosecution of his suit.

The answer of defendant denies the ownership of the plaintiff, and justifies under an order issued in the suit of Penkham v. George W. Rhodes, requiring him, as sheriff, to take the said goods and deliver them to the said Penkham, upon receiving from said Penkham an undertaking, etc., which has been given, etc.; and that he holds the said goods in his custody as sheriff, and under the said order of the Court.

The matter was referred; and the referee made a report, in which he distinguishes between an execution issued generally against the property of the defendant, and an order of Court directing the seizure of specific property, as in this case. That in the latter case the officer has no discretion, and could not inquire into the ownership; and, therefore, that in the discharge *of a duty thus imperative, the law [470]

ought to protect him; and, therefore, that he was protected in the seizure. But that, after notice by plaintiff, he was bound to proceed no farther, without indemnity from Penkham, to whom plaintiff could then have recourse. But as he continues in possession of the property, plaintiff can have recourse to him. And found the value of the property to be \$1330; and adjudged that plaintiff is entitled to recover the possession thereof, or if such possession cannot be recovered, then that plaintiff recover of defendant the value, with interest, etc.

Judgment was rendered accordingly, and defendant appealed.

Latham and Aldrich, for Appellant.

The action cannot be maintained against the defendant, who held it as sheriff, and by virtue of an order commanding him to take it into his custody. (9 Con. R. 140; 6 Mass. 421; 8 Mass. 246.)

A demand and refusal of the property should be shown, to maintain the action. (3 Mass. 288; 12 Wheat. 64; 6 Condensed Rep. 439; 5 Wend. 572.)

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The appellant's counsel insists, that holding the property by a seizure, made by virtue of his office as sheriff, the defendant was not liable to be sued for it by another claimant; but the authorities cited will be found to apply to cases of technical replevin. The 2d chapter of the Practice Act very clearly contemplates that there may be more than one claimant to property, and as many suits as there are several claimants. (See Laws, 535.)

Nor can I conceive upon what sound principle a party should be denied the right of action for his property, and the right of recovery against any one, whether a sheriff or not, unless it be held by legal process against himself.

***H. A. CHEVER, Appellant, v. JOHN C. HAYS, [471]
Sheriff, Respondent.**

¹ **ASSIGNMENT FOR BENEFIT OF CREDITORS, HOW MADE.**—A voluntary assignment, executed for the benefit of creditors, is void if not made in conformity to the statute of May 4th, 1852, entitled "An act for the relief of insolvent debtors, and protection of creditors."

STATUTORY CONSTRUCTION.—In construing statutes, force and meaning should be given to every part, and Courts will not, except when the language is so vague and indefinite as to be wholly destitute of meaning, reject any portion.

IDEM.—The hardship of a rule in special cases is no solid argument against it.

APPEAL from the District Court of the Fourth Judicial District for the County of San Francisco.

The plaintiff, as assignee of Ryan and Duff, complains of defendant, Sheriff of San Francisco, that the plaintiff, on the 30th day of May, 1853, was possessed, as assignee and trustee, by deed from Ryan, Duff & Co., in trust to pay all the debts of the said firm, of one million feet of lumber, of the value of \$50,000, and plaintiff being so seized, the said lumber came into the possession of the defendant unlawfully, under an attachment issued against said Ryan, Duff & Co. That plaintiff is entitled to the possession of said lumber as assignee aforesaid, yet defendant has refused, etc., and detains the same, under the said attachment.

The defendant demurred to the bill. The following facts were agreed upon on the argument:

That Ryan & Duff made a voluntary general assignment of all their estate, real and personal, to the plaintiff, for the benefit of their creditors, on the — day of May, 1853; that such assignment was not made in accordance with any of the provisions of the act relating to insolvent debtors; that the defendant, Hays, took possession of the lumber under and by virtue of an attachment issued out of the District Court of the Fourth Judicial District, in the suit of A. C. Check against the said Ryan, Duff & Co.; that the debt to said Check was

¹ Explained, *Cohen v. Barrett*, 5 Cal. 210; *Dana v. Stanfords*, 10 Cal. 277; *Naglee v. Lyman*, 14 Cal. 456. Distinguished, *Groschen v. Page*, 6 Cal. 189. Cited, *McAllister v. Strode*, 7 Cal. 430; *Judson v. Atwill*, 9 Cal. 478.

contracted after the said insolvent law went into operation, to wit, December, 28, 1852.

[472] *The Court sustained the demurrer, and gave judgment for defendant, and plaintiff appealed.

Sloan and Botts, for Appellant.

The deed of assignment is rendered void by the 39th sec. of the Act of 4th May, 1852, Stat. 52, p. 69. The words "insolvent debtor," used in section 39, mean a technical insolvent, who seeks the benefit of the insolvent law, and the word "assignment" applies to the process by which the debtor is enabled to obtain his discharge, by executing an *assignment* of all his property, as required by the 1st sec. of the act. (See said 1st sec. and sec. 39.) The counsel cited 5 Gill & Johns. 378; 6 Ib. 216; 2 Kent; 394, note a; 4 Mason, 209.

McAllister, Smith, and Rose, for Respondent.

MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

The only question presented by the present case is, whether a voluntary assignment, executed for the benefit of creditors, is void, if not made in conformity with the statute of May 4th, 1852, entitled "An act for the relief of insolvent debtors and protection of creditors."

The decision of this question turns upon the construction of the 39th section of the act referred to, which declares that no assignment of any insolvent debtor, other than as provided in this act, shall be legal or binding on creditors.

It is contended that this section only operates upon insolvent debtors within the meaning and applying for the benefits of the act, and that the common law rights of a debtor to prefer or assign, for the benefit of his creditors, is not taken away or affected by the statute.

In support of this position, the case *Hickley v. The Farmers' and Mechanics' Bank* (5 Gill & J. 377) has been cited. In that case it was declared by an act of the Legislature that "any deed, etc., made to a creditor or surety by any person

with a view or under an expectation of being, or becoming, an insolvent debtor, and with the intent thereby to give an undue and improper influence to such creditor, should be void;" and the Court held that **the words with a* [473] *view or under an expectation of becoming an insolvent debtor* meant, with a view or under the expectation of taking the benefit of the insolvent laws. In this case, the Legislature was treating of insolvency, and the words, "with a view or under an expectation of becoming an insolvent," were very properly held to apply to insolvency under the statute, or technical insolvency, as contradistinguished from the general acceptance of the terms.

The language of our statute is different, and it will appear from an examination of the various sections of the act, that the phraseology of the 39th section is not the result of accident, but was carefully, although perhaps inartificially, framed.

The 29th, 30th, and 31st sections provide, that if the debtor shall have been guilty of certain conduct, etc., "he shall be deprived of the benefit of the act."

Where then is the necessity of the 39th section, if it was intended to include only cases arising under the statute, as they have been already provided for in the previous section? In construing statutes, force and meaning should be given to every part of them, and Courts will not, except in cases where the language is so vague and indefinite as to be wholly destitute of meaning or construction, reject any portion of them. The act or condition of being an insolvent debtor, is a substantive fact, arising out of an existing state of circumstances, independent of legislation.

The Legislature has pointed out the mode by which these persons may escape from the liabilities which misfortune, or their own imprudence, may have brought upon them: to do this a certain course must be pursued, and unless it is strictly followed, all the benefits of the act are lost. After having provided this, it certainly would be a useless piece of repetition to enact the 39th section of the act, when the bill would be equally perfect in all its parts without it; and by the very terms of the act, the assignment would not be binding on creditors, unless made in conformity with the provisions of

The note declared upon was not proved or produced by plaintiffs.

The Court base their judgment solely on the sale of goods, and not upon the note. The averment that goods were sold, etc., is only inducement: the note is the real cause of action. The judgment is therefore not supported. (8 Johns. 149; 1 Ib. 33, and cases cited.)

Brooks and McCracken, for Respondents.

The note was shown to have come into the hands of defendant without payment. It was not necessary for plaintiffs to produce it, the form of action giving the defendant notice to produce it.

The Court found the substance of the issue. The variance is immaterial, and substantial justice has been done.

HEYDENFELDT, Justice, delivered the opinion of the Court. MURRAY, Chief Justice, concurred.

The declaration is upon a note, and there is but the one count.

The Court finds that the note was never given, but that the amount of indebtedness from the defendants to plaintiffs was for merchandise sold.

There is no plainer principle than that the *allegata* and *probata* must correspond.

The finding is against the averments, and it follows that the latter cannot support the judgment.

Judgment reversed, and cause remanded.

APPENDIX.

[This cause, and the one next following, viz., *The People v. Mott*, were adjudged at October Term, A.D. 1851, but not reported in the first volume of California Reports. Because of their importance, they are inserted here.]

THE PEOPLE of the State of California, ex relatione S.
R. HARRIS, Appellants, *v.* CHARLES D. BRENHAM,
Mayor of San Francisco, Respondent.

¹ **SAN FRANCISCO, ELECTION OF OFFICERS.**—The act to reincorporate the city of San Francisco, passed the 15th April, 1851, provides that the *first* election for city officers should be held on the fourth Monday of April, 1851; and *thereafter annually* at the *general election for State officers*. The general election was appointed by law to be held on the *first Monday in September of each year*. At the first election for city officers, held on the fourth Monday of April, as above directed, the respondent was elected Mayor of the city, was qualified, and was in the exercise of the functions of his office. At the general election held on the first Monday of September following, the relator received 1101 votes for Mayor, (the whole number given,) was qualified, and claimed the office of the respondent on the 24th of the same month. No notice of the latter election was given, or other measure pursued, by the City Council, under the 4th section of the 2d article of the charter. The respondent refused to surrender the office, and the relator filed this bill asserting his right to it, etc. *Held*, that the election of the relator was valid, and that the means of bringing about the election and the irregularities therein should be disregarded.

IDEM, CITY CHARTER, CONSTRUCTION OF.—It is not important to interpret the literal meaning of the word *annually* or the word *or*, as used in the city charter of 1851, respecting the election of municipal officers: the actual and substantial intention of the Legislature is to be sought after.

IDEM, RULE OF INTERPRETATION.—The best rule of interpretation of the statute in question is to follow the established policy of the government from its origin, which is, to make elective all officers of the State, counties, and cities, at the shortest period which the convenience of the public will permit.

OFFICE, TERMS OF.—Official terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary.

¹ Limited and qualified, *People v. Porter*, 6 Cal. 28. Doubted, *McKune v. Weller*, 11 Cal. 63, 64. Distinguished, *Payne v. San Francisco*, ante 126. Approved as to failure to make proclamation, *Dickey v. Hurlburt*, 5 Cal. 344.

[478] *APPEAL from the Fourth Judicial District.

This action was brought by the plaintiffs, by their attorney-general, upon the complaint of Stephen R. Harris, against the defendant, and avers that defendant is now, and has been since the 3d September, 1851, unlawfully holding and exercising the office of Mayor of the city of San Francisco. That said Harris was, on the 3d September aforesaid, duly elected to fill the said office, and is now entitled to hold and occupy the same, and had qualified as required by law; and had demanded of defendant the said office, with the books, papers, etc., who had refused to yield the same, etc., to the great injury and prejudice of the people of the State and of said Harris, and prays that said Brenham may be ousted from said office, and that said Harris may be declared the lawful incumbent, and invested with the authority and duties thereof, etc.

The defendant denied all the allegations of the complaint, and prayed to be dismissed; and for his costs, etc.

The case exhibits the following facts:

The city of San Francisco was first incorporated by law on the 15th April, 1850. The act of incorporation provided that the municipal officers should be elected on the fourth Monday of April in each year.

On the 15th day of April, 1851, an act was passed which repealed the above act, and reincorporated the city. By the last act it is provided that the first election for officers of the city should be held on the fourth Monday of April, 1851, and *thereafter annually* at the general election for State officers.

The election for State officers is appointed by law to be held on the first Monday in September of each year.

At the charter election held on the fourth Monday of April, 1851, the defendant was elected Mayor, was duly qualified, and went into the possession of the office, and the discharge of his duties.

At the general election for State officers held on the first Monday in September following, a portion of the qualified voters of the said city claimed the right to vote, and did vote,

for the municipal officers provided for in the act of 15th April, 1851, rechartering the said city.

*The entire number of votes so cast for Mayor was [479] 1101, all of which were given to the relator.

On the 20th of September, 1851, the Clerk of the County of San Francisco issued his certificate to the relator, certifying his election, who, on the 22d September, took the oath of office as required by law.

On the 24th September, 1851, the relator demanded of defendant the said office, books, papers, etc., who claimed the same in virtue of his election and qualification, as above stated, and still claims the same, and holds and exercises the functions thereof, and who refused to accede to the demand of the relator, and still refuses.

It was admitted that defendant was duly elected at the said charter election, held on the fourth Monday of April, and was duly qualified.

And it was also admitted that no election had been called by the Common Council of the city in September, 1851, nor any notice given of such election by the said Common Council, as required by the city charter in relation to charter elections.

The words of the Act of 1851, bearing upon the question in dispute, are as follows:

Sec. 1 of Art. II.—“For the government of said city there shall be elected annually, by general ticket, the following officers: a Mayor,” etc.

Sec. 5 of the same article.—“The first general election for officers under this charter shall be held on the fourth Monday of April, 1851, and thereafter annually, at the general election for State officers.”

Sec. 16, Art. IV.—“The officers elected under this charter shall continue in office for one year, or until their successors are qualified.”

After hearing the case, the District Judge decided as follows:

The complaint in this case alleges in substance that the defendant is now, and since the third day of September last has been, unlawfully holding the office of Mayor of the city of San Francisco, to which office the relator, Stephen R.

Harris, was on that day duly elected, and prays that the defendant may be ousted from said office, and that the [480] relator may be declared *the lawful incumbent, and invested with the authority and duties appertaining thereto.

The agreed case upon which the cause is presented, states :

1. That at the general election, on the third day of September, 1851, the polls were regularly opened in all the wards of the city of San Francisco, under the general election law.

2. That a portion of the qualified voters of the city claimed the right to vote for the municipal officers, provided for in the charter.

3. That the entire number of votes, so cast for the office of Mayor, was eleven hundred and one, all of which were cast for Stephen R. Harris, the relator.

4. That on the 20th of September, the Clerk of the County of San Francisco counted the votes, and issued a certificate to the said Harris, certifying his election to the office of Mayor, and that, on the 22d day of September, said Harris qualified, by taking the oath of office.

The facts then being thus admitted, the questions to be considered arise upon the construction of the act, reincorporating the city of San Francisco, passed on the 15th day of April, 1851.

It was conceded in the argument, that the omission by the Common Council to order the election, and to give public notice thereof, would not of itself vitiate the election.

I have no doubt of the correctness of this proposition. The popular will cannot be defeated by such a neglect, whether wilful or accidental, on the part of the Common Council; especially when the time and place of holding the election have been already fixed by law.

But it is by no means clear, that such order and notice are required at all.

The fifth section of the second article of the charter provides, that "the first general election for officers, under this chartet, shall be held on the fourth Monday in April, 1851, and thereafter *annually*, at the *general election of State officers*."

The third section of the same article provides, that "all

vacancies, except as hereinafter provided, shall be filled by election, in such manner as may be prescribed by ordinance," and *by the fourth section it is made "the duty [481] of the Common Council, to call all city elections, to designate the place of holding the same, giving at least ten days' notice thereof, to appoint inspectors of election, to examine the returns, and declare the results, and to determine contested elections."

I am inclined to the opinion, that the duty of the Common Council as prescribed in section four, was only intended to apply to such special elections as are prescribed by section three, and to the first general election, which took place on the fourth day of April last. Because the law has fixed the *time and place* for the election of city officers in future, to be at the *general election* of State officers; and it seems to me, that the Legislature, in thus fixing the time and place, clearly intended to incorporate the State, county, and city elections, into one general election, with one board of judges, who should be authorized to receive the votes for all officers to be chosen at such election.

If, therefore, under the charter, there should have been an election for the office of Mayor at the last general election, then the relator is legally elected to that office.

Much of the embarrassment in this case has arisen from its having been assumed by both parties that the term of office of the Mayor elected in April last would, in any event, be a fraction of a year, the relator insisting that such term continued only till the general election, which took place in September last, whilst the defendant contends that he is lawfully entitled to hold the office for the full term of the year, from the time of his election.

Such, indeed, is the conclusion at which I have arrived. It will be observed that there is no precise time fixed by the charter for the commencement or termination of the official year; but from the provision for holding the first election in April last, already referred to, taken in connection with section 16 of article 4, which provides, "that the officers elected under this charter shall continue in office for one year, or until their successors are qualified," it may be fairly inferred

that the official year hereafter, under this charter, should terminate on the fourth Monday of April, and that the officers to be elected at each general election in September [482] should enter upon the duties of their offices *on the fourth Monday of April, and that the officers to be elected at each general election in September should enter upon the duties of their offices on the fourth Monday of April following.

The language used in sec. 2 of Art. 3, "that both Boards shall assemble on the first Monday after their election," taken in connection with the several other provisions already referred to, can only be interpreted to mean, that they are to meet on the first Monday after the term for which they shall have been elected shall commence.

It is only by such a construction that complete effect can be given to the whole charter; and it produces less conflict than any other construction that can be given it.

It follows, therefore, that the defendant is legally entitled to hold the office of Mayor until the fourth Monday of April, 1852, at which time the relator's term of office will commence.

In accordance with this opinion, the District Court ordered judgment to be entered for the defendant, from which plaintiffs appealed.

———, for Appellants.

The charter provided for an election of municipal officers at the general election in September last.

Section 5, Art. 2, of the charter of 1851, provides that the first general election for officers shall be held on the 4th Monday of April, 1851, and *thereafter annually*, at the general election for State officers.

Here are two distinct provisions, the first for an immediate election, the other for a series of annual elections. The term "annually" does not relate to the first provision for an election in April; but *thereafter*, the election shall be had at the general election for State officers annually. In ascertaining the first term, therefore, "annually" may be omitted in the section, which would then read, "the first election, etc., shall

be held on the fourth Monday of April, 1851, and thereafter at the general election for State officers."

The provision, sec. 16, Art. 4, that the officers elected, etc., shall continue in office one year, or until their successors are qualified, shows the understanding of the Legislature that the first term was not for a year.

*The journals of the House and Senate show that a [483] bill passed the House, and was lost in the Senate, where the bill originated, to extend the term from September, 1851, to September, 1852. If the meaning of the section be doubtful, this "cotemporary exposition" ascertains it, and shows that it was well understood that the term ended in September, and also that the Senate refused to extend it. (3 How. 564, 565; 1 Black. 60.)

No order of the Council was necessary. The election was provided for by law; the time, place, and inspectors of the general elections were provided for, and after the first election, the municipal officers were directed to be elected at the general election, that is, at the same time, place, etc., and by the same machinery. The Council, therefore, could not supply time, place, or inspectors, and so much of section fourth of the charter as provides for the appointment of time, place, etc., in relation to elections by the Council, must be held to apply to such special city elections as may occur under other sections of the charter, filling vacancies, etc. (See Charter, Art. 2.)

But if the 4th sec., Art. 2, should be held to apply in these respects, it is merely *directory*. (Rex v. Loxdale, 1 Burr. 447, per MANSFIELD, Justice. "There is a known distinction between things which are of the essence of the act to be done, and things which are not." (See Smith's Stats. 679, 680, 681, 673; 7 Hill, 9; 12 Wend. 486; 11 Ib. 605; Smith, 671; 2 Watts, 9; 8 Vern. 280, 390.)

If these provisions are not advisory, then the Governor may defeat any State election—the County Judge may defeat any county election. Either may secure a continuation of office, and defeat the popular will.

The *election* determines the rights of the person elected.

(*Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1647-9; *Ex parte Hiatt et al.*, 3 Hill, 43, 47.)

The term commences on the first Monday after the election. (See Art. 3, p. 1, of the charter.)

McLean and Norton, for Respondent.

By the charter, the general elections are to be annual, and *the one for 1851 was fixed for the fourth Monday of April. (Charter, 1851, Art. 2, sec. 15; Art. 4, sec. 16.)

This is in conformity to the policy of this State, and of all others, in relation to municipal elections. (Smith's Com. 740, sec. 622; Char. 1850, p. 224, sec. 4; p. 226, sec. 19.)

See also the general laws for incorporating cities and towns, and other special incorporations. (Laws of 1850, 91, sec. 32, p. 128; sec. 2, p. 73; sec. 21, p. 121; sec. 8, p. 124; sec. 21, p. 127; sec. 21, p. 134; sec. 31.)

Departure from this general policy was not intended. (6 Barbour, 60.)

The construction which would give two elections in the year 1851 would occasion great collision between the various provisions of the charter. (Char. of 1851, Art. 2, sec. 1; Art. 4, sec. 16.)

The word "*or*," in sec. 16, Art. 4, is synonymous with the word "*and*," and is so used in the legislation of this State. (Laws of 1850, p. 124; sec. 21, p. 127; sec. 21, p. 134; sec. 2, p. 85; sec. 1, p. 163; sec. 3, p. 226; sec. 19; Smith's Com. 751, sec. 637.)

The Constitution, giving one election in 1851, renders all the provisions of the charter harmonious, and gives effect to every word in its natural meaning, and in the order and place in which it occurs. (Smith's Com. 588, sec. 419; *Ib.* 672, and 651, sec. 508; *Ib.* 619, sec. 465-6; *Ib.* 603, sec. 442.)

The ordinary meaning of the word "*annually*" in statutes is not a measure of time, but successive calendar years. (Const. California, art. 4, sec. 3; Laws of 1850, 64, sec. 13; Laws of United States, vol. 1, 73, sec. 1; Revised Stats. of Mass., part 1, ch. 15, secs. 17, 18, 20-36; ch. 11, sec. 5; ch. 13, sec. 40.)

The word "annually," in sec. 5, is, by the word "*thereafter*," connected with, and refers to, the election of April, 1851. (Revised Stats of Mass. 101, sec. 3; Ib. 127, sec. 20; Smith's Com. 711, sec. 576; Sacramento City, Laws of 1850, p. 73, sec. 21, p. 79; sec. 2.)

The word "first," in sec. 5, establishes the election of April, 1850, as one of the annual elections. (See provisions of other *statutes; Charter of 1851, art. 2, sec. [485] 128; Laws of 1850, 206, sec. 15, p. 81; sec. 123; Law concerning Offices, 1851, sec. 14.)

The absence of any express or incidental provision, indicating a contrary understanding by the Legislature, is controlling in favor of defendant's construction. (Laws of 1850, 91, sec. 31, 32, p. 128; sec. 2, p. 123-4; sec. 20 and 21, p. 124; sec. 21, p. 134; sec. 20, 21, p. 97; sec. 2, p. 73; sec. 21.)

No election was held in September, 1851. The Common Council did not call or notify an election. (Char. 1851, sec. 4, art. 2; 5 Burr. 2681; 1 Adol. and Ellis, 878; Revised Stats. of Mass. 8, 1 ch. 15, secs. 8, 17, 18; 6 Mit. 340; Laws of 1850, 91, sec. 32.)

The day being fixed by the statute does not affect the case. (2 Kent's Com. 295; Cowper, 538; Election Law of 1850, 101, sec. 5 and 8.)

The argument *ex necessitate*, has no application, as there is an effectual remedy by mandamus. (1 Barn. and Cress. 310; 4 Burr. 2011; 8 East, 270; 6 T. R. 301; Pr. Act, 1851, title 12, ch. 2.)

If the action of the Common Council could be dispensed with, still what transpired was not an election. (Charter, 1851, sec. 4, 57; Election Laws of 1850, p. 102, sec. 17; General City Incorporation Law, 1850, p. 91, sec. 32.)

If the relator was elected in September, he did not qualify within the time required by law. (Charter of 1851, art. 4, sec. 15; 20 Wend. 12; 1 Revised Stats. of New York, 122, sec. 34; 9 New Hamp. 524.)

If relator was duly elected, and duly qualified, his term of office does not commence until the fourth Monday of April next. (Law Concerning Offices, 1851.)

Chief Justice HASTINGS delivered the opinion of the Court. MURRAY, Justice, concurred with the Chief Justice in his conclusion, but for different reasons, and delivered his opinion in conformity to his views. LYONS, Justice, dissented.

HASTINGS, Chief Justice.—Three propositions are [486] suggested *relating to the construction of the charter of the city of San Francisco, regulating the election and terms of the officers of the city:

1. That the election should have been holden in September, 1851, and the terms of the officers to commence in April, 1852.

2. That the first election having been holden on the first Monday of April, A. D. 1851, the second election should be postponed until the September general election, 1852.

3. That the term of the respondent should cease at the State election of September, A. D. 1851, and that the election of the relator, as his successor, was legally holden at that time.

One of these propositions must be adopted, and we shall adopt that which would naturally produce the least injury, and best harmonize with the intention of the Legislature, and the general policy of the State Government, relating to the terms and tenure of office.

The first proposition violates section 2, article 4, of the charter, which provides that both boards (of Aldermen) shall assemble on the first Monday after their election, and would operate an injury to the public in this, that they would be deprived of the services of officers, who would usually be elected for causes influencing the minds of the electors at the time, which might not exist months after, and a wrong upon the officers elect, by postponing the commencement of their terms, until the first Monday of April, of each year.

The second proposition is obnoxious to the 16th section of article 4, which provides that the officers elective under this charter shall continue in office for one year, or until their successors are qualified, as it gives the respondent a term of seventeen months, a greater term than any of his successors could be elected to. This is not usual in the incipient organ-

ization of any city government, and such a term is not contemplated and prescribed by the charter.

By adopting the third proposition, it is difficult to perceive how the public can suffer further injury, than a change of officers may produce, during the prosperous administration of the affairs of the city; and this could be of no great moment, provided competent successors are elected. It is true that this construction seems to conflict with the 16th sec. referred to, and the *general policy of the charter, [487] which contemplates a term of one year, and but one general election for each year, and curtails the term of the respondent to a half year; but the term of one year is not absolute. It may be limited by an event which may happen, viz., the election and qualification of a successor, prior to the termination of the term. It is not of much importance to interpret the literal meaning of the word *annually*, or of the word *or*; the actual and substantial meaning and intention of the Legislature is to be sought after, and we know of no better rule than to follow the established policy of the State Government, from its origin, which evidently is to make elective all offices of the State, counties, and cities, at the shortest periods which the convenience of the public will permit.

Governed by this policy, we should not extend official terms beyond the time clearly defined, but rather by implication, if necessary, shorten the duration of a term, than prolong it.

Adopting the third proposition, the first official year in the government of the city of San Francisco should have closed at the September general election for 1851, and the second official year should have thereupon commenced.

This would give the respondent a fraction of a year for his term, and not one full term, and a fraction of a second.

As to the validity of the election of the relator, we are of the opinion that the decision of the Court below is correct. He received a majority of all the votes cast, at an election ordered by law; and the means of bringing about the election, and irregularities therein, should be disregarded, as it is to be presumed that all of the electors knew the law, and were not prevented from voting by any fraud or misconduct on the part of those who conducted and managed the election. The

time and place of the election being fixed by law, it may have been the duty of the Common Council to give notice thereof; and should they fail to do so, or to perform any other duty required, prior to the election, a writ of mandamus might issue from the Courts commanding them to discharge their duty: but this would not afford immediate relief; and it ought not to be in the power of incumbents in office to prevent the election of their successors, at the time and place pre-
[488] scribed by law, by neglect on their part. *Unless the election of the relator is a nullity, he acquired a right to the office, which should be protected. So much, therefore, of the judgment of the Court below declaring the election of the relator to be valid is affirmed, and that part of the decision of the Court postponing the commencement of the term until the first Monday of April, 1852, is reversed, and the District Court is ordered to enter judgment in this case accordingly.

MURRAY, Justice.—Although I concur with the conclusions of the Chief Justice, I have been led to them by a somewhat different train of reasoning, and desire to state my views upon the questions arising in this case.

The only points of any importance for our decision are, 1st, Does the City Charter provide for an election for city officers to be held in September, 1851, at the general election for State officers? And 2d, If such an election was contemplated and provided for, was the election of the relator valid and sufficient? Those portions of the charter which relate to the time of elections and the term of office, are sec. 1st, art. 2d, which provides, that "there shall be elected annually, by general ticket, a Mayor," etc. Sec. 16, art. 4: "The officers elected under this charter, shall continue in office for one year, or until their successors are elected and qualified." And sec. 5, art. 2: "The first general election under this charter for city officers, shall be held on the fourth Monday of April, 1851, and thereafter annually, at the general election for State officers." Upon the construction of this section turns the whole case. To me the plain and obvious meaning of this section is, that there shall be an election for city officers,

at the general election for State officers, in each year, commencing with the election of 1851.

There is no difference of opinion as to the signification of the word *annually*, it being conceded that it does not mean a measure of time, but a succession of calendar years. For the purpose of giving effect and operation to the new charter as speedily as possible, an election was provided for the fourth Monday of April, 1851; and thereafter, elections are to be holden annually, (or in each year,) at the general election for State officers. The word annually does not relate to the first election of April, so as to make it one of the annual elections contemplated *by the charter. There are two [489] distinct provisions in the section, one providing for an immediate election, so as to give vitality to the charter; and the other, *thereafter*, for a series of annual elections, to be held at the time of the general election. The first general election, after the election of April, 1851, was the election of September, 1851, at which time city officers were required to be chosen, and no conflict of the provisions of the charter arises from this construction.

On the other hand, it is contended that the election of April was the first of a series of annual elections provided by the charter, and that the second election should not have been held until 1852. It is said that it is the uniform policy of the Legislature of this State, as well as of other States, to create annual terms for municipal officers; and that a provision of law requiring two elections in one year would be a wide departure from this settled policy, resulting in great loss and inconvenience to the public. I have been unable to find any such policy expressed in the acts of our Legislature, and as far as anything can be inferred from the acts themselves, it is apparent that the Legislature has endeavored to limit the terms of all officers to as short a period as possible. At least, the fact that the Legislature has in most instances fixed the term of our municipal officers for one year, does not prove, or raise the presumption, on a fair construction, that they did not in this instance intend to limit the first term to five months. In fact, the unsettled and uncertain state of things, together with the history of municipal corporations

in this State, raise the inference that the Legislature may have regarded the inconvenience of frequent elections as inconsiderable, compared with the benefits to be attained.

Neither can the case cited of the Charter of Sacramento City be used to sustain the construction contended for by the appellees. The charter provides that the first election shall be held on the first Monday of April, 1850, and after the first election, elections shall be held in May of each year. This would require all municipal officers to be again elected in one month. This was a mistake of the Legislature, and unless corrected, would have led to great trouble and dispute; but

I do not see how an error of this kind can be considered as a precedent settling the *legislative construction of this case; but, on examination, I find that the Legislature passed a separate act, correcting that mistake, and continuing the term of office until May, 1851; so that if the case prove anything, it is, that the Legislature, in a case similar to our own, thought it a matter of sufficient importance to correct, by a separate act, that which they knew to be a mistake.

But considering that the construction of this section is doubtful, there is no better way of arriving at the intention of the Legislature than by consulting the legislative history of the bill. After the passage of the charter, a bill was introduced, and passed the House, so amending the *fifth section of the 2d article* that the second election should be held in 1852. This bill was indefinitely postponed in the Senate. What is the necessary inference? Can it be, as contended by the appellees, that the matter was so plain as to need no explanations, and therefore the Senate refused to concur? Nothing is more common in legislation than amendatory and declaratory acts. If there were such grave doubts in the House as to the meaning of this section, why should the Senate, where the bill originated, if they had understood its meaning to be the same as that given by the House, have refused to concur and rectify the mistake, if one existed?—more especially as the Legislature had, on a former occasion, and in a similar instance, viz., that of Sacramento City, deemed it of sufficient importance to correct a mistake by a

declaratory act. To my mind, the conclusion is inevitable, that the Senate understood that the first term of office extended only to a period of five months, that the charter contemplated an election in September, 1851, and that they were unwilling to alter it. If, however, I am mistaken in my deductions from this action of the Legislature, I hold it to be a proper and necessary rule of construction that whenever there is a question whether the people have parted with a particular right, and the question cannot be clearly determined from the grant of power itself, the intendment of law must be in favor of popular rights; and this rule, if a proper one, settles the first part in favor of the relator.

If, then, the election for city officers should have been held at the general election in September, 1851, let us inquire if the election of the relator was sufficient. Upon examination, it is *apparent that the Legislature de- [491] signed, as far as possible, to consolidate all elections, State, county, and city, into one. Section 6, art. 3, of the charter provides that all provisions of law regulating elections for State officers shall apply, so far as practicable, to elections under this charter. The general election law provides the time, place, and inspectors for the election. The Common Council have no right to alter the time, place, and inspectors, so provided under the general election law, and their authority under the 4th sec. of 2d art. of the charter to designate the place, appoint the inspectors, etc., can only relate to elections to fill vacancies, and such special elections as the law may direct.

But it is contended that there was no notice given by the Common Council, as directed by sec. 4, art. 2; and many authorities are cited to show that this is a duty incident to corporations, and necessary to be performed, in order to give validity to the election. There is a wide difference between the cases cited and the one at bar. Here, all the machinery of an election was provided—time, place, and inspectors. The case of the election by the Council was not of the essence or substance of the election, not something that must be done, but merely directory; and no neglect of their officers to perform a mere ministerial act would defeat the right of the people

to elect their agents or officers. If a different rule should be holden, then the Governor, by refusing to issue his proclamation, or the Council, by refusing to give the notice required by law, might continue themselves in office beyond the term for which they were elected.

It is said, however, that the proper remedy would have been by mandamus, to compel the Common Council to call the election. It is made the duty of the Council to give ten days' notice of the elections. No Court could presume that the Council would neglect a duty imposed by law. A mandamus could not have issued until the time of calling the election would have gone by; so that if there is anything in the argument, it would have been useless and unnecessary. It has long been a settled rule of law and practice of Courts to sustain elections held in good faith, where there is no complaint of surprise, mistake, or fraud. In this case, all the substantial

requirements of law have been complied with, and [492] no fraud is alleged or proved. It is hardly *necessary to say, that the Court cannot regard the number of votes cast: the right of one man to exercise the privilege of a vote is as absolute and undeniable as that of thousands, and he is entitled to the results arising from the exercise of that right, whether the community at large think proper to participate with him or not.

By this election, the rights of the parties were determined, and it is not in our power to disturb them.

In relation to the failure of the relator to qualify within ten days after the election, I do not understand that there is any authority whatever to show, that this necessarily vacates the office; this provision of the charter is merely directory, and has always been held as such by other Courts; besides, the inspectors have ten days in which to make their return: the agreed case shows that the relator qualified within ten days after the return, which is all that the law could possibly require. Sec. 2, art. 3, requires both boards of Aldermen to assemble on the first Monday after their election, and fixes the time when the term of the officer elected shall commence. Upon these considerations, I am of opinion that the second election under the charter should have been holden at the

general election for State officers in September, 1851, that the relator was properly elected in September last, and that the term of his office commenced upon the Monday following said election.

LYONS, Justice.—This action is brought to determine the right of the relator, Harris, to the office of Mayor of the city of San Francisco. No question is made as to the right of the defendant to hold the office by virtue of his election in April, 1851, until a successor has been duly elected and qualified, and the decision of this case therefore depends upon the right of the relator as such successor. In behalf of the relator, it is claimed that the defendant's term of office expired on the third day of September last, and that on that day the relator was duly elected as his successor.

The city of San Francisco was first incorporated by a law passed on the 15th day of April, 1850, which provided, that the officers should be elected on the fourth Monday of April in each year. On the 15th day of April, 1851, a new act of incorporation was passed, and the former charter repealed. By the new *charter, it is provided that the [493] officers "shall be chosen annually," and that the first election shall be held on the fourth Monday of April, 1851, and thereafter annually, at the general election for State officers. The election for State officers is appointed by law to be held on the first Monday of September of each year; and the first and principal question to be decided is, whether the provisions of the new act of incorporation required two elections for city officers to be held in the year 1851—the first on the fourth Monday of April, and the second on the first Monday of September; or whether it provided but for one election in that year, and for the subsequent annual elections to be held on a different day of the year. There are but three sections of the charter bearing directly upon the subject. Sec. 1, of art. 2, is as follows: "For the government of said city, there shall be elected annually, by general ticket, the following officers: a Mayor," etc. Sec. 15th of the same article is in these words: "The first general election for officers under this charter shall be held on the fourth Monday

of April, 1851, and thereafter annually, at the general election for State officers. No election shall be held in any place where intoxicating liquors are vended." Section 15th of art. 4th, runs thus: "The officers elected under this charter shall continue in office for one year, or, until their successors are qualified," etc. The obvious meaning of these provisions, as they appear to my mind, is that the general elections under the charter are to be held once in each year—the one for 1851 in the month of April, and those for subsequent years at the time of the general State election. But it is urged for the relator that the word "annually" does not determine the second election to be in the year after the first, because the day of the second election would not be exactly a year after the first. This would be so if we consider the word annually as having no other signification than the recurrence of periods exactly one year apart. I do not understand that to be the meaning of the word. If it were, the provisions of the charter are utterly irreconcilable, for an election held in September, either in the same year with the April election, or the year thereafter, would not be annual in that sense. We should

therefore be obliged to construe this section as if this [494] word was not in it, and the utmost *result would be, that the section *might* so be read as to *allow* of the second election in the same year, provided such an intention is expressed, or could fairly be inferred, from other parts of the charter. But no such intention is elsewhere to be found: on the contrary, both the other sections that have any bearing upon the subject, are directly adverse to the intent sought, and they must both be deprived of their natural meaning and effect to allow of such construction of the fifth section.

By section 1, of article 2, the elections are to be annual: by section 5, the April election of 1851, is designated as the first of these elections: by section 16, the officers are to hold for one year, or until their successors are qualified; and nowhere in the charter is there the slightest intimation that the elections are to be *oftener* than once a year, either in 1851, or any other year, unless it be found in the possible construction of the section which we have now considered.

The suggestion that the word "*or*," in section 16, indicated

that the officers might be elected for less than one year, is without force, as it appears to have been copied from the former charter, in respect to which no such suggestion could apply, and the same word is used by the Legislature, in various other acts of incorporation, as synonymous, in similar provisions, with the word "*and*." But there is no occasion for construing the word "*annually*" out of section fifth. . A very common, indeed the most usual, meaning of this word in statutes is to designate the succession of calendar years, and not the exact period of a solar year. An example may be found in the constitution of this State. Article IV., sec. 3, provides that the members of Assembly shall be chosen annually; yet the day, as we know, after having been once fixed by the Legislature, and elections held accordingly, was, before the recurring date, changed to another day. Again, by a law passed in 1850, (chap. 16, sec. 13,) it is enacted "that there shall be paid annually out of the general fund, to the order of the government, a sum not exceeding five thousand dollars, to defray the contingent expenses of administering the government of the State." It will not be assumed that if the money thus appropriated be drawn from the treasury at other than the regularly recurring periods of twelve months, *the law will be violated. By section 17, [495] chapter 15, of the Revised Statutes of Massachusetts, it is enacted "that the annual town elections shall be held in the month of March or April," the particular day of either of these months to be fixed by the warrant of the selectmen in each year.

These are instances in which the words annual and annually are employed to designate successive calendar years, in cases where at the same time it is contemplated that the particular periods of the year will vary. Moreover, in the section under consideration, the word "*annually*" is connected by the word "*thereafter*" with the preceding election in April. The provision is not that there shall be an election in September and thereafter annually, but in April and thereafter annually.

For the relator it is further said, that a difference may be perceived between expressions in which the word "*annually*"

should precede or follow the word "thereafter," that is, that after mentioning the election for April, 1851, the Legislature, by saying "they shall be held 'thereafter' annually at the general State elections," separated the word "annually" from "April, 1851," and intended something different from what would have been expressed, had the words been "in April, 1851, and annually thereafter, at the State general elections." On the other hand, it is said for the defendants, that the word "annually" in the section quoted, in order to sustain the views of the relator, should grammatically have been connected in one phrase with the succeeding words, so as to read, "thereafter annually at the general State election," etc., whereas it is separated by the punctuation, standing by itself, as if thrown in expressly to prohibit the holding of another election in the same year with the one already fixed for the month of April. Having the mind preoccupied with the purpose of discovering a particular meaning, it may be possible to catch from these particulars the shadow of such an intent as the respective parties seem to perceive, but it is quite too unsubstantial to form the basis of a judicial decision.

In interpreting statutes, "it is the duty of the Judge to give effect to the expressed sense or words of the law, in the order in which they are found in the act, and according to their fair and ordinary import and understanding." [496] (Smith's Com. 588.) *The words in section 5 have an ordinary import and understanding in the order in which they are found in the act, and the plain intendment of the enactment is, in my opinion, that the first election should take place in April, 1851, and in each year after 1851, at the general State election.

If any doubt remained as to the propriety of this construction, it would be removed by the legislative construction given to a similar provision in the charter of the city of Sacramento. The construction claimed by the relator is, that after the election in April, 1851, the elections are to take place *in each year* at the time of the general election, and that the first of such subsequent elections must be held the first time a general State election occurs, such general election having been fixed by law for September in the same

year. By the charter of Sacramento city, it is provided that the first election should take place on the first Monday of April, 1850, and that after the first, the elections should be held on the first Monday of May *in each year*, by which, according to the construction claimed by the relator, a second election would be required in one month after the first. But the provisions of the same charter, that other officers elected in April, 1850, should hold office until May, 1851, show clearly that the Legislature understood the law differently.

Looking beyond the law itself, to find an interpretation of its meaning from the motive and consequences of its provisions, the one side insists that a postponement of the election would defer, for a period, the exercise of the important right of the people to change and select their agents, and therefore the Court should incline against such construction. The other side urges that the occurrence of elections for all the officers of a city twice in one year is unprecedented, and that such a requirement of the law is not to be inferred from a *possible* construction of one of its sections, but should have been clearly and distinctly expressed. If this were a case in which it became necessary to seek outside the law itself for a guide to its meaning, I should have no hesitation in adopting the latter of these constructions. A provision of law which should require all the officers of the municipal corporation, such as the city of San Francisco, to be elected twice in the same year, and at periods less than five months apart, *would certainly be a wide departure [497] from the system of legislation in like cases in this State, and it is believed in all other States of the Union. The attention of the Court has not been drawn to any such instances. Such a law might occasion, and would certainly contemplate, a change not only of the officers directly elevated by the people, but of all the other appointees of the corporation; so that all the agents employed in administering the important and multifarious affairs of a great commercial city, would be changed, after a term of service scarcely long enough to make them familiar with the duties of their employment. With the change of men, would follow a change of measures, and the evils usually attendant upon instability

and fluctuation in public concerns. On the other hand, a simple change of the day of the year upon which an annual election shall be held is a matter of comparatively little moment, and instances of such change are of frequent occurrence in legislation.

At the date of the passage of the new charter, (April 15th, 1851,) the day of the annual State election was fixed by law for the first Monday of October, but on the 26th of April, the day was changed to the first Monday of September. It does not appear that there was any direct purpose to require two elections in one year, nor was there any important public object to be effected by so doing; and it is only to be inferred from the policy of the Legislature, which seems to have been to diminish the frequency of election days, by requiring the local elections, heretofore held in the spring, to be hereafter held at the general State election in the fall, and in carrying out this policy, two elections in the first year was a consequence incidentally resulting from the change of election days. But the object sought to be accomplished would be effected without resorting to any such unusual measure, by simply deferring the day from the fourth Monday of April, 1851, to the first Monday of September, 1852. This would, it is true, extend the time of the officers elected on the first-named day, a little more than four months, a circumstance attended by no derangement of the public affairs, nor, as it would [498] seem, affecting them materially in any respect; *as those officers would be elected with reference to such extended term. No privilege or right of the electors would be taken away, or curtailed. Their right under the established policy, is to select their agents once in each year, and that right is not taken away or diminished in value, by directing it to be exercised at a different season of the year. In short, the construction of the new charter, as contended for by the relator, would occasion an unusual deviation from the established line of public policy, possibly producing serious derangement and injury to the public interests, and for no adequate object.

It was further shown to the Court on the argument, by the concurrence of counsel for both parties, that eight days after

the passage of the new charter, and five days before the first election under it, a law was introduced into the Assembly, amending section five, by inserting a proviso, "that the second election should not be held until 1852," which law passed through all the various stages of legislation in the lower House, and was sent to the Senate the same day: on the third day thereafter, its consideration in the latter body was indefinitely postponed. On one side it is insisted that this was an attempt to procure an alteration of the law, which failed in the Senate; whilst the other maintain that it was intended as simply an explanatory provision, introduced before any election had been held, in order to obviate the possibility of any question arising after the election should have been decided. I think the latter the obvious signification of this proceeding. The manner of its passing the House shows that it must have been by the general concurrence of the whole body; and I cannot imagine that the same legislators who had so recently passed a law providing for a second election within about four months of the former, if such is the construction, should in such a manner pass a law, postponing the second election sixteen months from the former. The only proper inference to be drawn from the action of the Senate is, that the law was considered sufficiently explicit without the amendment. It is not to be supposed of a legislative body, that it would purposely leave a law in a condition to give rise to controversy and litigation as to its meaning, and it would be an extravagant supposition, that *the House had [499] originally intended a different, and so widely a different purpose, as to the time of the two elections, and without understanding each other's meaning.

This, however, is not a case in which it is allowable to look elsewhere than at the law itself to ascertain its meaning. It is a first principle of law upon this subject, that if the words of a law express clearly the sense and intention of the law, we must hold to that. (Smith's Com. 219.) In this case, I think the sense and intention of the law are clearly expressed in its words, and that the second election was provided to take place at the general election for State officers, in the year 1852.

The majority of the Court not entertaining these views, the other controverted points may be examined. First, granting that an election may have been held, was there such an election actually held, according to law? Sec. 4, art. 11, of charter, makes it the duty of the Common Council "to call *all* city elections, to designate the place of holding the same, giving at least ten days' notice thereof, to appoint inspectors of elections, to examine the returns, and decide the results," etc. In this case the Common Council omitted to perform the duty assigned them. No call or notice that an election would be held was published, no inspectors appointed, no place designated. The authority to hold elections under the charter has its source in the call by the Council: the circumstance of a day having been designated in the charter, of itself determines nothing—the words are simply directory. (2 Kent's Com. 2097.) The electors look to the call of the Council, as the only evidence that an election is to take place; and the holding of an election without such notice would have the effect to entrap the corporators into an omission to exercise their rights; and such was its manifest effect in this instance, it being conceded that not more than one-fifth of the legal voters cast their ballots for the municipal officers, although they were in attendance at the polls, and voted for State and county officers. I think there is no force in the argument, that the Common Council might, by refusing to publish the call for an election, maintain themselves in office longer than the term for which they were elected. The law affords an effect-
[500] ual *remedy against such usurpation, and the Courts do no hesitate to interpose their authority. (*Rex v. Mayor of Norwich*, 1 Barn. & Ad. 310; *Rex v. Cambridge*, 4 Burr. 2011; *Rex v. Thetford*, 8 East, 270; *Rex v. Mayor of Grampond*, 6 T. R. 301; Pr. Act, tit. 12, chap. 2.)

I think the failure to comply with the requirements of the charter, fatal to the validity of relator's election.

But if this call of the Council could be dispensed with, still it was indispensably necessary that inspectors of election duly qualified, authorized to receive votes, administer oaths, and determine the qualifications of voters, should have been appointed. No such inspectors were appointed, either by the

Common Council, or the direct action of the people on the day of election, according to the provisions of law. Whence did the county inspectors, who undertook to receive and count the votes for municipal officers, derive their authority in the premises? Certainly not from the charter, nor directly from the people, for they made no appointment in the manner prescribed in the general election law.

In order to give validity to this election, it seems to me to be necessary to distort the obvious meaning of some of the words of the charter, and entirely to expunge others, and sometimes substituting words not found in the instrument. Thus the provision that the election shall take place at the general election, must be held, not merely to designate the *time* of the election, but the *place* and the *officers* by whom it is to be held, and the provision that the "Common Council shall call *all* city elections, designate the place of holding the same," etc., etc., must be held to mean *not* ALL elections, but only particular elections, viz., special elections. To establish that an election ought to have taken place in September, 1851, it becomes necessary, in my opinion, to disregard the obvious meaning of the charter, as expressed in sec. 1-5, art. 2, and 16, art. 4; and in order to establish that an election did take place, all the provisions of sec. 4, art. 2, must be kept out of view; and in order to establish the right of the relator to the office he claims, sec. 15, art. 4, must be disregarded, that section declaring "that any person *elected to a [501] city office, who shall fail to qualify within ten days after his election, his office shall be deemed vacant." I can discover no authority or reason thus to violate express and obvious provisions of the charter, which regulates interests so important as those of this city, or defeats the action of those electors who had at the preceding election legally appointed their own agents. For these reasons, I dissent from the opinion of the Court.

[502] *THE PEOPLE, ex rel. W. T. BARBOUR, v. GORDON N. MOTT, Respondent.

¹ **ELECTIVE OFFICE, APPOINTMENT TO VACANCY IN.**—The Legislature having created the Tenth Judicial District, and not having appointed a Judge therefor, the Governor, on the 1st May, 1851, appointed the respondent, who was duly qualified. The relator, on the 10th October thereafter, received a commission from the Governor as Judge of said District, having been elected by the people at the September general election of the same year, and was duly qualified. The relator appeared in court at the October Term, and the respondent being on the bench, claimed his right to exercise the duties of Judge of the Court. The Court decided that he had no such right, the respondent claiming to hold under his appointment and commission from the Governor until the election and qualification of a District Judge in September, 1852: *Held*, that the relator is rightfully entitled to the said office.

APPEAL from the Tenth Judicial District.

This case was submitted to the Supreme Court upon a statement of facts agreed upon, which, so far as they are material, are as follows:

William T. Barbour and Gordon N. Mott both held commissions from the Governor of the State of California, for the office of District Judge of the Tenth Judicial District.

On the 28th July, A. D. 1851, the Governor issued his proclamation, as required by law, designating certain offices to be filled at the general election to be held on the first Wednesday in September, (the 3d,) 1851, and stating, among other things, that a District Judge, in the place of Gordon N. Mott, would be chosen by election in the Tenth Judicial District, by the qualified electors of said District, composed of the counties of Yuba, Nevada, and Sutter.

In pursuance of this proclamation, and the election held on the 3d day of September, 1851, the qualified electors in the said District voted for different persons for that office, and William T. Barbour received a majority of their votes, as polled, and a certificate of his having duly received such majority was transmitted to the Secretary of the State; and

¹ Office, appointment to fill vacancy distinguished, *People v. Mizer*, 7 Cal. 523; *Weeks v. Gamble*, 13 Fla. 18. Vacancy, how created, cited in dissenting opinion of FIELD, J., *People v. Whitman*, 10 Cal. 49. Distinguished, *People v. Tilton*, 37 Cal. 620.

on the 3d day of October instant, the Governor of the State issued a commission in due form to *the said [503] William T. Barbour, as Judge of the Tenth Judicial District of the State.

On the 9th day of October instant, the said William T. Barbour duly took the constitutional oath of office, which was endorsed on his commission, and a copy of which is filed in the office of the Secretary of State.

On the 10th day of October instant, the said William T. Barbour, having been commissioned and qualified as aforesaid, appeared in the District Court of the Tenth Judicial District, sitting in the county of Yuba, and wherein the said Gordon N. Mott was presiding at the time, when the following proceedings took place:

“This day came William T. Barbour, and in open Court produced his commission from the Governor of the State of California, as Judge of the Tenth Judicial District of the State, and demanded, by virtue of his election, by the qualified voters of the said district, at the last general election, held in said District on the 3d of September, 1851, and his commission as aforesaid, upon which was endorsed a certificate of his having duly taken the constitutional oath of office, to enter upon the discharge of the duties of said office; and the Court being sufficiently advised of and concerning the premises, considers the said William T. Barbour as not entitled to said office, and refuses to permit him to take upon himself the exercise of the duties and powers of the Judge of the Court. To which decision the said W. T. Barbour excepted, and by the agreement of the parties, the legal questions at issue between the said Barbour and G. N. Mott are referred to the Supreme Court for its adjudication, for which purpose this Court is ordered to be adjourned until the 3d Monday of October, 1851, without prejudice to parties.”

Gordon N. Mott received his commission as Judge of the Tenth Judicial District from the Governor, there being a vacancy in the office of Judge of that District, upon receiving which he duly took the constitutional oath of office, which was endorsed on said commission, a copy of which was filed in the office of the Secretary of State, and has acted as Judge

of said Judicial District, under his commission, ever since the 1st day of May, 1851; and he claims and insists that he is by the Constitution of this State invested with and entitled to hold his office as District Judge of *this District until the election and subsequent qualification of a District Judge in the year 1852; and admitting the allegations of W. T. Barbour to be true, G. N. Mott insists that said Barbour is not entitled to the office which he claims.

The above facts were submitted by the parties to the Supreme Court, waiving all informalities, and praying an early decision.

No briefs accompany the record.

HASTINGS, Chief Justice, delivered the opinion of the Court as follows:

This case is brought here informally upon an agreed statement of facts, in substance as follows:

The Legislature at its last session having created the Tenth Judicial District, and not having appointed a Judge therefor, the Governor, on the 1st day of May last, issued a commission to the respondent, who was duly qualified, as required by law. That the relator, on the 10th day of October last, received a commission from the Governor as Judge of said District, having been elected by the people at the September general election, and was duly qualified by taking the constitutional oath of office. That the relator having appeared in Court, the respondent then being on the bench, claimed the right to exercise the duties of Judge of the Court. The Court decided that he had not such right, and adjourned until the 3d Monday of October, for the purpose of obtaining the decision of this Court upon the right set up by the relator.

The office of District Judge is usually termed a constitutional office, as distinguished from those offices which are created by the Legislature. It is an office whose term is fixed by the Constitution, and it is not in the power of the Legislature to abridge or in any manner impair its functions.

Nor can the Legislature supply a vacancy in it at any time, in any manner contrary to the plain meaning and intent of the provisions of the Constitution.

Art. 6th, sec. 5th, creates two terms, of different duration, the first for two years, and the second and all succeeding terms for six years. The first was merely provisional and temporary, the *second and all future terms per- [505] manent, and the office ever thereafter elective.

The District Judge for the first term was to be "appointed by the joint vote of the Legislature at the first meeting." This is the only instance in which the Legislature can exercise the power of appointment of a District Judge, and seems to have been conferred upon that body in the one instance, on account of the inconvenience and delay attending an election of the people on the primary organization of the several departments of the State government. In case of a vacancy happening after the first session, section 8th, article 5th, provides, not that the Legislature shall appoint, but that the Governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election of the people. If the appointment of the District Judge could not be made by the Legislature, why is the commission to expire at the close of its session?

The object of this clause seems to be, to enable the Legislature to make the appointment, if it be the duty of that body to do so, by the Constitution or laws, or to enact laws for this purpose, provided the people could not otherwise elect, but if they could elect, then the commission is limited to the period of an election, and not by the end of a session of the Legislature. The 8th section referred to, does not authorize the executive to supply the vacancy for the term. It contemplates that either the Legislature or the people shall supply the balance of the unexpired term. The statute which we are now called upon to pronounce unconstitutional and void is one of the laws providing for filling a vacancy in an office made elective.

The Constitution not authorizing the executive to fill the vacancy to the end of the term, this power must be exercised by the people or the Legislature. The Legislature, if possessing such power, have conferred it upon the people by this statute, and it will not be questioned that if the Constitution

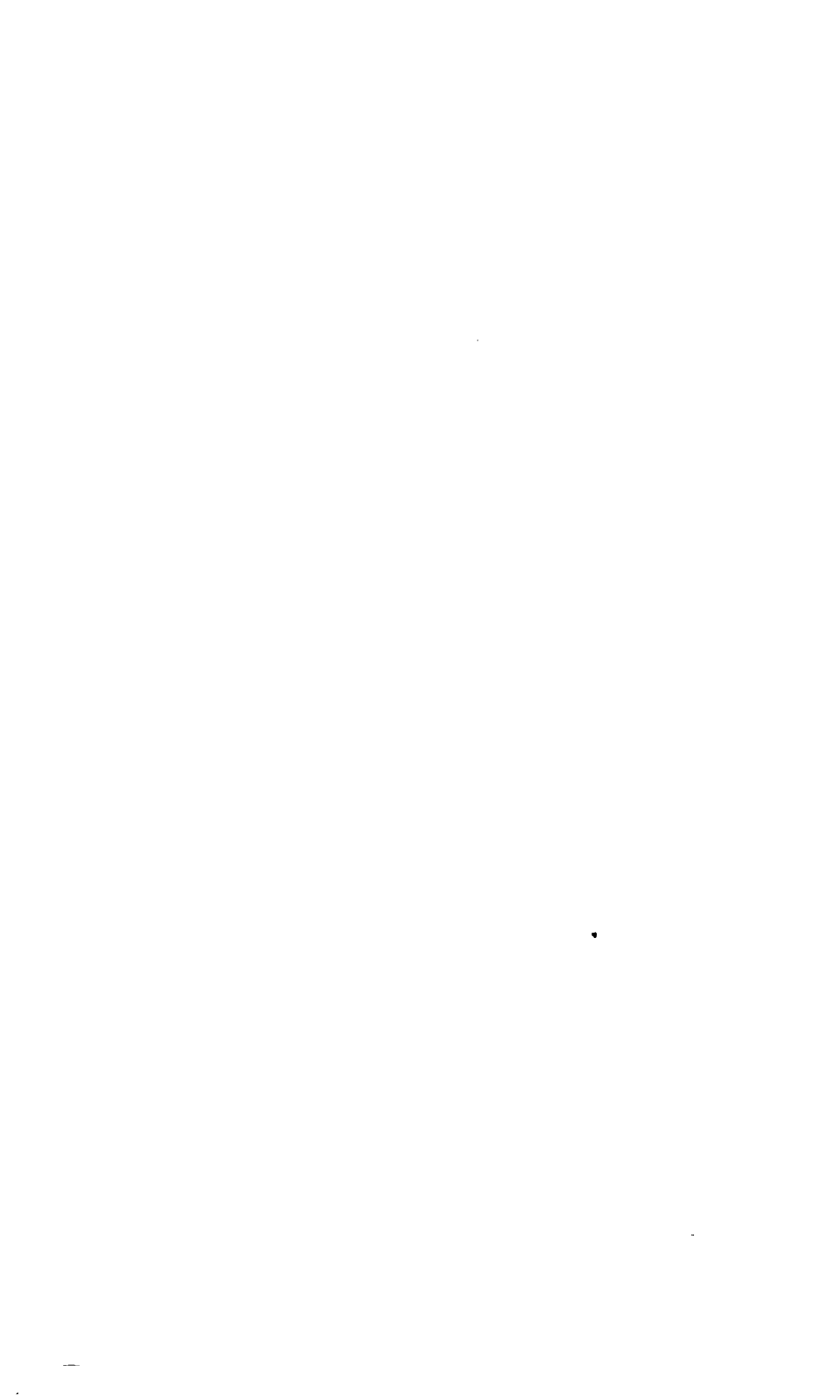
had been silent upon the mode of appointment to office, the Legislature could delegate the power to the people to elect to every office, judicial and civil. It is contended that [506] the executive appointment should *continue to the end of the term. This is not the language of the instrument, and must only be supported by inference.

And we will not by implication confer that power upon the executive which is so repugnant to the spirit and policy of the Constitution.

The words "next election by the people," the Legislature has construed to mean, the next election after the vacancy happens. We see no reason to believe that any other was intended. If the next general judicial election was intended for District Judges, it would so have been expressed. In support of the present statutes, we do not deem it necessary to cite authorities to the principle, that before a law can be held unconstitutional, it must be clearly repugnant to the Constitution, nor to the point, that if the meaning of a constitution be doubtful, its general spirit and policy shall govern.

We think the relator, W. T. Barbour, is rightfully entitled to the office of District Judge of the Tenth Judicial District for the remainder of the present term of District Judges of this State.

I N D E X.



INDEX.

ABANDONMENT.

See EVIDENCE, 6.

ABATEMENT.

See PLEADING, 13.

ACCOUNTS.

See INTEREST, 2, 3, 4; MORTGAGE, 3.

ACTIONS.

1. ACTION FOR RENT.—Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title; or by one of two litigant parties claiming the land: this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson v. Shaeffer*, 196.
2. IDEM, ALLEGATIONS MATERIAL.—The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, was the allegation of a contract; and this plaintiff is bound to establish, to enable him to succeed. *Id.*
3. ACTION FOR USE AND OCCUPATION.—No action for use and occupation will lie, where possession is adverse and tortious, for such possession excludes the idea of a contract, which in all cases of this action, must be either express or implied. *Id.*
4. ACTION FOR USE AND OCCUPATION.—The right to recover for use and occupation is founded alone on contract. *O'Conner v. Corbitt*, 370.
5. ACTION AGAINST FACTOR, WAIVER OF TORT.—A plaintiff has a right to waive a tort, as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales. *Lubert v. Chauvileau*, 458.
6. FORMS OF ACTIONS.—The distinction in the form of actions *ex delicto* and *ex contractu* was abolished by statute, but the general principles which govern such actions are retained. *Id.*
7. JOINT ACTION.—Where a suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo v. Stanbury*, 465.

See ATTORNEY AND COUNSEL, 1; CERTIORARI, 1, 2; CONSIGNOR AND CONSIGNEE, 1; EXECUTION, 2; FERRY, 1; GAMING, 1, 5; GARNISHMENT, 2; MORTGAGE, 3; NUISANCE, 11; PARTNERSHIP, 1, 3; PLEADING, 9; PROMISSORY NOTES, 2; PUBLIC LANDS, 2; PUBLIC OFFICERS; SET-OFF, 1.

ACT OF CONGRESS.

See PUBLIC LANDS, 1, 6.

ADMISSION.

1. **ADMISSIONS OF PARTY CONCLUSIVE.**—Where one of the issues was the condition of the goods (hops) in question when they left New York, and defendant had admitted on the trial that "if merchantable when they left New York, he made no claim:" *Held*, that he was concluded by this admission. *Berritt v. Gibson*, 396.

See CRIMINAL LAW, 1; ESTOPPEL, 3, 5; FRAUD.

AFFIDAVIT.

See COSTS, 1, 3, 5; NEW TRIAL, 3; PLACE OF TRIAL, 4, 5.

ALCALDE GRANTS.

See PUEBLO LANDS, 4, 7, 11, 13, 14.

AMENDMENT.

1. **VARIANCE, AMENDMENT TO PLEADINGS.**—Where the proof does not sustain the allegations of the bill, and where by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done, it is error. *Connally v. Peck*, 75.
2. **AMENDMENT OF JUDGMENT, WHEN ERRONEOUS.**—The defendant was sued and served by the name of *George Mott*, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the Court to amend the judgment, by altering the name of *George* to *Gordon*. *Held*, that this was error. *McNally v. Mott*, 235.

See APPEAL, 17; COSTS, 1, 4; COURTS, 6, 8; VERDICT, 1, 2.

ANSWER.

See PLEADING, 13, 15.

APPEAL.

1. **APPEAL, WHEN IT LIES.**—Under the act regulating appeals, passed 26th April, 1851, an appeal lies from every order and decision of an inferior court, which affects a substantial right. *Burgoyne v. Perry*, 50.
2. **IDEM TO DEMURRER.**—An appeal to a demurrer for want of proper parties, is therefore good where it is determined by the Court that a substantial right is affected by the omission to join such party. *Id.*
3. **APPEAL, ERROR MUST APPEAR.**—The appellate court will not disturb the order of an inferior court in granting or refusing a new trial, unless manifest error shall appear. *Bartlett v. Hogden*, 55.
4. **FERRY LICENSE, APPEAL FROM ORDER OF COURT OF SESSIONS.**—The 21st sec. of the act of March 18th, 1850, gives to any person who shall be aggrieved by the order of the Court of Sessions, granting a license to establish a ferry, the right to appeal from the same to the District Court, on giving bond within thirty days, etc., upon which appeal "further proceedings shall be had, and judgment rendered thereon, as in other cases of appeal." *Webb v. Hanson*, 65.
5. **IDEM, JUDGMENT OF DISTRICT COURT CONCLUSIVE.**—No appeal from the decision of the District Court has been provided in such cases by law, and unless the party can bring himself within the constitutional provision, the judgment of the District Court is final and conclusive. *Id.*

6. **APPEAL, WHEN IT DOES NOT LIE.**—This Court cannot review such decision of the District Court. Whether its decision, or the appeal from the Court of Sessions, was proper or not, can make no difference: this Court is bound to suppose it was correct. *Ib.*
7. **JUDGMENT, PRESUMPTIONS.**—Where judgment was entered upon a default for \$124 75, and it did not appear that any testimony had been heard, the presumption that a judicial officer has acted regularly, was held to apply to the case, and nothing appearing to the contrary, this Court will presume that the Judge had informed himself as to the matter of complaint, in a proper and regular manner and such judgment will be affirmed. *Crane v. Brannan*, 192.
8. **APPEAL, STIPULATION WHEN DISREGARDED.**—Where a written stipulation is filed by the parties in the Court below, to govern the proceedings there, but has not been brought to the notice of the Court for its adjudication, the appellate Court will not regard it. *Clarke v. Forshay*, 290.
9. **STIPULATION DISREGARDED, REMEDY.**—If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the Court in which it was filed, or in some Court of original jurisdiction. *Ib.*
10. **APPEAL FROM ORDER, WHEN WILL NOT LIE.**—An appeal will not lie from an order of Court, refusing to set aside a former order. Such order is merely negative, a refusal to disturb the first decision. It is *that*, the former decision, which is the subject of complaint, and not the refusal to alter it. *Henly v. Hastings*, 341.
11. **APPEAL FROM ORDER, WHEN WILL NOT LIE.**—An appeal will not lie from an order of Court refusing to set aside an interlocutory judgment. It should be taken upon the order itself. *Stearns v. Marvin*, 376.
12. **DISTRICT COURT NOT APPELLATE.**—The District Court has no appellate power. *People v. Peralta*, 379.
13. **DISTRICT COURT HAS NO APPELLATE POWER.**—So much of the act of the Legislature as provides for appeals to the District Court is unconstitutional and void. *Caulfield v. Hudson*, 389.
14. **NEW TRIAL, GRANTING OR REFUSING IN DISCRETION.**—Refusing or granting a new trial will not be disturbed, except where there is a gross abuse of discretion. Nor where the decision of the Court is upon bare questions of fact. *Speck v. Hoyt*, 413.
15. **APPEAL, REVIEW OF ORDER GRANTING NEW TRIAL.**—Where the question of law was adverse to the verdict, and the Court might well have granted a nonsuit, or instructed the jury to find for the other party, a new trial should have been granted; and the refusal to do so was such an improper use of its discretion as calls for the exercise of the revisory power of this Court. *Ib.*
16. **APPEAL FROM JUDGMENT OF COURT OF FIRST INSTANCE.**—Where the action in the District Court was founded upon a judgment in the Court of First Instance, and an appeal was taken from the judgment of the District Court, the record of the Court of First Instance was brought up by certiorari to this Court, and the judgment was found invalid. The judgment of the District Court was reversed, and the case remanded. *Parsons v. Davis*, 421.
17. **AMENDMENT, AFTER APPEAL.**—The case sent back, with leave to plaintiff to amend his declaration, and to the defendant to answer over. *Montiflori v. Engels*, 431.
18. **JUDGMENT, VALIDITY OF.**—A judgment which is right will not be reversed because it is rendered upon a wrong reason. *Helm v. Dumars*, 454.

19. **DISTRICT COURT HAS NO APPELLATE POWER.**—No appellate power belongs to the District Court. *Hernandes v. Simon*, 464.
20. **APPEAL, REVERSAL FOR INSUFFICIENT FINDINGS.**—Process issued against several defendants, but one of whom appeared: no default was taken as to the others, and a joint judgment was rendered against all. And there being no sufficient finding of the facts and conclusions of law to sustain the judgment, the verdict being general, the judgment was reversed. *Estell v. Chenery*, 467.
- See COSTS, 8; COURTS, 10; DAMAGES, 8; ERROR, 1-3; REMITTITUR; STATEMENT; SUMMONS, 4, 5; WITNESS, 3.

ARBITRATION AND AWARD.

1. **ARBITRATION, EFFECT OF SUBMISSION.**—When parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. *Montiflori v. Engels*, 431.

See REFERENCE.

ARREST.

1. **QUESTIONS OF FACT HOW DECIDED.**—On a rule to show cause why the arrest of a party ordered by the Court on the allegation of fraud should not be vacated, the question of fact involved in it must be decided like any other fact, by the weight of evidence. *Southworth v. Resing*, 377.
2. **FOR FRAUD, WHAT MUST BE SHOWN.**—To entitle a party to the remedy of arrest, it is not necessary that he should show positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended. *Ib.*
3. **WRIT, WHEN SHOULD BE GRANTED.**—As a matter of practice, it is safest to award an arrest, even in cases of doubt, for the defendant is protected by his bond from abuse by the process; without which process the plaintiff may be remediless. *Ib.*

ASSIGNMENT.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS, HOW MADE.**—A voluntary assignment, executed for the benefit of creditors, is void if not made in conformity to the statute of May 4th, 1852, entitled "An act for the relief of insolvent debtors, and protection of creditors." *Chever v. Hays*, 471.

See REPLEVIN.

ATTACHMENT.

1. **REMEDY WHEN TO APPLY.**—The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which are made in, or are payable, in this State. *Dutton v. Shelton*, 206.
2. **WHAT NOT SUBJECT OF.**—A debt due for merchandise sold in Boston, to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the act of 29th April, 1851. *Ib.*
3. **WHEN PARTY ENTITLED TO.**—To entitle a party to attachment under this act, the contract must be made in this State, or must contain a stipulation that the money is to be paid here. *Ib.*

4. **ATTACHMENT, MONEY IN CUSTODY OF THE LAW NOT SUBJECT TO.**—Money in the hands of the sheriff collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment. Where the attaching creditor is without other relief, quere? *Clymer v. Willis*, 363.
2. **IDEM, MONEY IN HANDS OF SHERIFF.**—The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner. *Ib.*

See GARNISHEE, 1, 2; INJUNCTION, 4.

ATTORNEY AND COUNSEL.

1. **ATTORNEY, ACTION AGAINST FOR NEGLIGENCE.**—In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained. But if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error. *Cavillaud v. Yale*, 108.
2. **IDEM, RIGHT TO RETAINING FEE.**—An attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. *Ib.*

See COSTS, 5; SUMMONS, 1.

BAIL.

1. **WHEN DISCHARGED FROM LIABILITY.**—The respondents were bail in a recognizance conditioned for the appearance of M., to answer at court, upon an indictment found against him, on the 19th April, 1852. M. appeared at the proper term, which was the June Term following, and on the 17th June moved to quash the indictment, for causes assigned, which was ordered by the Court. Another indictment on the same charge was found by the grand jury then in session, at the same term, on the 18th June, upon which M., being called, made default. Afterwards suit was brought upon the recognizance, against the bail, and judgment obtained thereon. *Held*, that the bail were entitled to relief against the said judgment. *People v. Lafarge*, 190.

BAIL BOND.

1. **BAIL BOND, ACTION ON.**—Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending. *People v. Smith*, 271.
2. **IDEM, INSUFFICIENT ALLEGATIONS.**—If the condition be to appear "wherever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called "in the said Court of Sessions" is not sufficient. *Ib.*

BAILMENT.

1. **BAILMENT, AGREEMENT FOR SALE OF SECURITIES.**—A party depositing securities for securing the payment of a debt, or advancements made thereon, may agree that they shall be sold, at the option or pleasure of the creditor. *Hyatt v. Argenti*, 151.
2. **AUTHORITY OF BAILEE TO SELL.**—And where the plaintiff drew several drafts upon the defendant, who held the deposit, directing him to pay them "from the proceeds of the securities in his hands," this was held to give an authority to the plaintiff to sell the securities deposited to meet the drafts. *Ib.*

3. **IDEM.**—An order to pay, "when in funds, from the proceeds," makes the deduction conclusive, that other sales had yet to be made by the defendant. *Ib.*
4. **IDEM, VALIDITY OF SALE.**—A sale made under such authority, is good without notice to the plaintiff of the time and place of sale, or previous demand of payment. *Ib.*
5. **IDEM, PERSONAL PROPERTY MAY BE PLEDGED, ETC.**—Personal property may be pledged, mortgaged, hypothecated, or placed in trust, upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case. *Ib.*
6. **IDEM, CONTRACT OF BAILMENT.**—When such contract is absolute upon its face, the party asserting a condition or limitation, must show it. *Ib.*

See CONSIGNOR AND CONSIGNEE, 1; CONTRACT, 5; DAMAGES, 9.

BILL OF SALE.

See DELIVERY, 2.

BOARD OF SUPERVISORS.

See CERTIORARI, 1, 2.

CASES CITED, COMMENTED ON, APPROVED, ETC.

- Alcalde Grants, Validity of.*—Woodworth v. Fulton, 1 Cal. 295. Disapproved in Cohas v. Raisin, 451.
- Counsel Fees as Damages.*—Heath v. Lent, 1 Cal. 412. Overruled in Ah Thae v. Quan Wan, 217, 219.
- Demand for Rent.*—Gaskill v. Trainer, cited in Chipman v. Emeric, 288.
- Findings, Statement how Made.*—Russell v. Amador, 2 Cal. 305. Construed in Brown v. Brown, 111. Cited as inapplicable in People v. Lafarge, 135.
- Gambling Debts not Recoverable.*—Bryant v. Mead, 1 Cal. 441. Approved in Carrier v. Brannan, 329. This latter case followed in Davis v. Goodman, same term (not reported.)
- Gambling License not Recoverable in Action.*—People v. Craycroft. Approved in People v. Baynes, 367.
- Jurisdiction, District Court has no Appellate Jurisdiction.*—People ex rel. Attorney-General ex parte, 1 Cal. 85. Approved in Caulfield v. Hudson, 390. And see Hernandez v. Simon, 454; Caulfield v. Hudson, 389. Approved in People v. Peralta, 379.
- Mandamus, Remedy under Statute.*—People v. Fitch, 1 Cal. 519. Cited in People v. Olds, 177.
- Mexican Grants, Validity of.*—Reynolds v. West, 1 Cal. 323. Approved in Cohas v. Raisin, 451; Leese v. Clarke, 17. Distinguished in Vanderalice v. Hanks, 46, 47, 48.
- New Trial, Newly-discovered Evidence, Showing Required.*—Bartlett v. Hogden, 55. Cited in Brooks v. Lyon, 114.
- Nuisance, Right to Destroy Building to Prevent Conflagration.*—Surocco v. Geary, 69. Followed in Heatley v. Geary, same term, (not reported.)
- San Francisco, Construction of Charter.*—People v. Brenham, 477. Distinguished in Payne v. San Francisco, 128.

CERTIORARI.

1. ACTION WHEN PREMATURE.—A certiorari to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board. *Wilson v. Supervisors*, 386.
2. IDEM, WHEN ACTION WILL NOT LIE.—The objection, want of jurisdiction over the subject, should first be taken before the Board: it may decide to take or decline jurisdiction, and until it does one or the other, there can be no cause of complaint. *Ib.*

CHATTEL MORTGAGE.

See BAILMENT, 5.

COLLATERAL SECURITY.

See BAILMENT.

COMMON LAW.

See DEED, 4; GAMING, 6; MANDAMUS, 1; NUISANCE, 11.

COMPLAINT.

See PLEADING, 5, 6, 7, 11, 14.

CONFESSIONS.

See CRIMINAL LAW, 1.

CONFLAGRATION.

See NUISANCE.

CONSIGNOR AND CONSIGNEE.

1. CONSIGNEE, LIABILITY FOR MONEY HAD AND RECEIVED.—In an action for money had and received by the consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered. *Johnson v. Totten*, 343.
2. IDEM, FOR PROCEEDS OF SALE BY.—Such sale must be taken, in reference to the rights of the plaintiff, to have been made for cash; and to the vendor belongs the demand created by the sale against the vendee; and the vendor is liable to the plaintiff for money had and received. *Ib.*

See ACTIONS, 5, 6, 7; DEBT, 3; PLEADING, 16.

CONSTITUTIONAL LAW.

See APPEAL, 13; NUISANCE, 3; SUMMONS, 5.

CONSTRUCTIVE POSSESSION.

See MINES AND MINING CLAIMS, 1.

CONTINUANCE.

1. AGREEMENT FOR, TO BE IN WRITING.—An agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the Court. *Perralla v. Marica*, 185.

CONTRACT.

1. CONTRACT TO DELIVER GOODS, WHEN COMPLETE.—A contract by defendant, "to deliver to plaintiff as many grapes as he should wish, at a given price," is a mere offer, which the plaintiff had the right to accept or reject, and defendant to retract

at any time before acceptance; but when the plaintiff named the quantity which he would take, the contract became complete, and both parties were bound by it. *Keller v. Ybarra*, 147.

2. **CONTRACT, RIGHT TO CONTRIBUTION ON JOINT CONTRACT.**—Plaintiff and defendant took a joint lease for improving certain property. Plaintiff, with consent of defendant, made, in his own name, a contract to make the improvements stipulated by the lease, which he performed, and paid or advanced all the expenses out of his own funds. This contract was drawn by defendant himself. Plaintiff claimed damage of defendant for the failure to advance funds on his part as the buildings advanced, and the *value* of the buildings erected by him (the plaintiff.) The Court below decreed that the plaintiff recover equal contribution of the money advanced by him, from the defendant, with three per cent. per month interest, the then current rate; which decree was affirmed by the Supreme Court. *Young v. Polack*, 208.
3. **JOINT CONTRACT, RIGHT OF ACTION ON.**—Where a joint contract was made by M. and C. for the purchase of a quantity of flour of defendants, and the defendants delivered one portion of the flour to M. and another to C., on their respective orders, and received payment from them severally, and settled with C., and then cancelled the contract with regard to him, and M. afterwards sued for damages, alleged to have been sustained by him alone, on the contract. *Held*, that if plaintiff relied upon the original contract between him and C. and the defendants, he could not sue without joining C. in the action. *McGivern v. Moorhead*, 267.
4. **CONTRACT, CONSTRUCTION OF.**—M. B. C. contracted with the owner of a ranch to take the ranch under his charge, and take care of it to the best of his ability, etc., and the owner stipulated in recompense of his services, and to cover his expenses, to give him one-fourth part of all the increase of the cattle, etc., upon the ranch, when parted at the end of five years. M. B. C. assigned his contract to L. C. against whom a judgment was obtained, and execution issued to the sheriff, who levied upon and sold a portion of the cattle upon the ranch, then claimed by the widow of the said owner, who had died in the meantime. The five years to which the contract was limited having expired, the widow brought trespass against the sheriff for the cattle thus levied upon and sold. *Held*, 1st. That the questions asked by the plaintiff, which might have produced answers showing acts of ownership on the part of the plaintiff, and tending to prove her possession of the property, (which was disputed,) was evidence, and should not have been excluded. 2d. That the true construction of the contract gave no present interest in the live stock to M. B. C., but only to acquire a determinate interest, after the performance of all the stipulations on his part, and that these could not be completed until the expiration of five years from the execution of the contract. 3d. That the undertaking on the part of M. B. C. was strictly personal, the result of the owner's confidence in his skill, etc., and its spirit and meaning was that no other should be substituted in his place. 4th. That the assignee of M. B. C. had no right whatever in the cattle which could be made the subject of a levy and sale. *Fitch v. Brockmon*, 348.
5. **CONSTRUCTION OF SALE, WHEN ABSOLUTE.**—Fuller purchased some yokes of oxen of Helm, the appellant, for \$1000, paid \$200 down, and gave his note, with C. as surety, for the balance. C. signed the note on the express condition that title to the oxen was to remain in Helm till they were fully paid for. Fuller was to have the absolute use of them. The oxen were placed in the hands of a brother of Helm, who was in the employ of Fuller, as a driver, with the intention of securing the title in Helm. The defendant, a constable, levied upon and sold the oxen, thus situated, as the property of Fuller. *Held*, that the sale by

Helm to Fuller was absolute, and that Fuller had such a right of property in them as was subject to execution. That Helm retained no effective lien upon the property. There was no agreement in writing to that effect, nor did Helm, as mortgagee, retain possession; but it was under the control and direction of Fuller. The legal consequences of this condition of things cannot be evaded by showing that the property was in the possession of Fuller's hired servant as agent or trustee. *Helm v. Dumars*, 454.

See BAILMENT, 5, 6; COVENANTS, 1; DAMAGES, 3, 4; DELIVERY, 2; HUSBAND AND WIFE, 8; INTEREST, 1; STATUTE OF FRAUDS, 1.

CONTRIBUTION.

See CONTRACT, 2.

CONVEYANCES.

See DEED, 1-6; EVIDENCE, 5.

COSTS.

1. COSTS, AMENDMENT TO BILL OF.—Under the 68th sec. of the Practice Act, the Court have power in the exercise of its discretion to allow the amendment of a bill of costs, and the affidavit accompanying it. *Burnham v. Hays*, 115.
2. IDEM.—Where the original bill of costs is filed within the time prescribed by the act, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part. *Ib*,
3. IDEM, REMEDY OF DEFENDANT.—If the original affidavit was a nullity, the defendant should have taken proper steps to set it aside, or have appealed from the judgment, on the ground that the costs had been waived by operation of the statute. *Ib*.
4. IDEM, POWER OF COURT.—But where the defendant himself moved a retaxation of the costs, it was proper for the Court, in its discretion, to allow such amendments as were just and necessary. *Ib*.
5. IDEM, AFFIDAVIT, SUFFICIENCY OF.—The affidavit by the attorney of the party accompanying the bill of costs is good under the statute. *Ib*.

See REMITTITUR, 2, 4, 5.

COUNSEL FEES.

See DAMAGES, 1; INJUNCTION, 1.

COUNTY COURT.

See SUMMONS, 2.

COURTS.

1. DISTRICT COURT, POWER TO GRANT RELIEF FROM JUDGMENT.—The District Court is not limited by the present act as to the time within which it may grant relief upon a judgment unjustly or improperly obtained. *People v. Lafarge*, 130.
2. IDEM, APPLICATION FOR RELIEF.—No particular form is required by the statute in which application shall be made for such relief. All that is required is, that the facts shall be set forth, and if they show a case coming within the rule, it is sufficient. *Ib*.

3. **IDEM, ON THE GROUND OF FRAUD.**—Where the application for such relief charges fraud, among other causes, and the applicant does not rely upon the fraud alone, for his relief, there is no error in the Court granting the relief without first directing an issue to try the fraud. *Ib.*
 4. **IDEM, DISCRETION OF COURT.**—Whether good cause is shown, is a question properly addressed to the discretion of the Court. *Ib.*
 5. **POWERS OF COURTS OF EQUITY.**—All courts having chancery jurisdiction have power to set aside a judgment improperly obtained. *Ib.*
 6. **JUDGMENT, POWER OF COURT TO AMEND.**—A Court may, at any time, render, or amend, a judgment, *nunc pro tunc*, where the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court. *Morrison v. Dapman*, 255.
 7. **IDEM, WHEN NOT AMENDABLE.**—But if there is record evidence to show that the judgment was different from the one entered, the latter must stand until reversed. *Ib.*
 8. **IDEM, POWER WHEN LOST.**—Nor will a Court be permitted, after the lapse of a term, to open a judgment upon motion, and render a new judgment. *Ib.*
 9. **COURTS, AUTHORITY WRONGFULLY EXERCISED.**—It was a wrongful exercise of authority in the District Court to strike out, on an *ex parte* motion, a marginal entry of satisfaction on a judgment rendered two years before. *Henly v. Hastings*, 311.
 10. **DISTRICT COURTS HAVE NO APPELLATE POWER.**—The District Courts have no appellate power; and the act providing for appeals to those Courts is unconstitutional and void. *Caulfield v. Hudson*, 339. *People v. Peralta*, 379. *Hernandez v. Simon*, 464.
- See **AMENDMENT**, 2; **COSTS**, 1; **DEPOSITIONS**, 2; **NONSUIT**; **PLACE OF TRIAL**, 1; **SUMMONS**, 5.

COURT OF FIRST INSTANCE.

See **APPEAL**, 16.

COURT OF SESSIONS.

See **APPEAL**, 4, 6; **JUDGMENT**, 1.

COVENANT.

1. **PLEADING, INSUFFICIENT DEFENCE IN ACTION ON ACCOUNT.**—In a suit for the recovery of the purchase-money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant in his answer denied that the plaintiff was the lawful owner, or that he had any title to the land. *Held*, that to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that failing in this, his defence to the action was defective. *Thayer v. White*, 228.

CRIMINAL LAW.

1. **ADMISSIONS OR CONFESSIONS AS EVIDENCE.**—In a trial for murder, where the admission or confession of the party was resorted to as evidence, it was held to be error to exclude any portion of it, made at the same time with that portion of it which was admitted. *People v. Navis*, 106.

See **BAIL BOND**, 1.

DAMAGES.

1. **DAMAGES, REVIEW ON APPEAL.**—The amount of damages is simply a question of fact within the province of the jury. This Court will not undertake to examine the proofs, or declare that the evidence was insufficient to justify the verdict. *Bartlett v. Hogden*, 55.
2. **DAMAGES, COUNSEL FEES.**—Generally, the recovery of counsel fees, as part of the damage, is not allowed, as where the loss is *consequential*; but where the loss is *direct*, as in the case of an improper commencement and prosecution of a suit, or other process in a suit, it should be allowed. *Ah Thae v. Quan Wan*, 216.
3. **MEASURE OF DAMAGES ON CONTRACT FOR SERVICES.**—The loss of time, value of services, and wages of employees, caused by the failure of a party to perform his contract, are not remote, but strictly proximate and immediate damages, and ought to be allowed. *Kenyon v. Goodall*, 257.
4. **DAMAGES, FOR FAILURE TO DELIVER GOODS.**—In a suit for damages, for the failure of the defendants to deliver goods according to contract, the true rule of damages is the difference between the price agreed between the parties and the market value of the goods at the time of the breach of the contract. *Tobin v. Post*, 373.
5. **IDEM, SPECULATIVE PROFITS NOT ALLOWED.**—The admission of testimony to prove the speculative profits of the plaintiff in such actions is error. *Ib.*
6. **IDEM, EVIDENCE AS TO VALUE INADMISSIBLE.**—Where the contract was for the cargo, or all the goods of a given description in a given vessel, and there were no other like goods in the market: *Held*, that the admission of evidence to show what they were worth in broken parcels was error. *Ib.*
7. **IDEM, MEASURE OF DAMAGES.**—The difference between the value of the cargo and the contract price is the true measure of damages. *Ib.*
8. **APPEAL, REVERSAL ON.**—Where the damages were laid at one thousand dollars, judgment for fifteen hundred dollars was reversed on appeal. *Palmer v. Reynolds*, 396.
9. **DAMAGES ON SALE OF GOODS BY FACTOR.**—If the plaintiff waives the tort, and sues defendants as factors, they must be considered as acting under his authority, and plaintiff can only recover the *net proceeds* of sales effected by them, after deducting necessary charges and commissions. *Lubert v. Chauviteau*, 458.
10. **IDEM, EVIDENCE INADMISSIBLE.**—It is error to admit evidence of the *value* of the goods sold in such action, where no charge is made of fraud, non-performance, or negligence. The strict measure of damages in such case is the *net proceeds* of sale. *Ib.*

See CONTRACT, 2; FERRY; FORFEITURE, 3; INJUNCTION, 1; PARTNERSHIP, 2; PLEADING, 12; VERDICT, 2.

DEBTOR AND CREDITOR.

1. **DEBTOR, ASSETS OF ABSENT DEBTOR.**—To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law. *Lupton v. Lupton*, 120.
2. **CREDITORS, LEGAL AND EQUITABLE RIGHTS OF.**—If the bill discloses such remedy at law, it will be dismissed upon demurrer. *Ib.*
3. **CONSIGNEE AS PARTNER, WHEN INDIVIDUALLY LIABLE.**—The plaintiff consigned goods to McL., who sold them and received the proceeds. McL. was the partner

of a firm, (and one of the defendants,) which being in want of funds, proposed to another partner, B., (also a defendant,) to loan the money of plaintiff in his hands for the purposes of the firm, to be repaid when funds of the firm could be had; which was consented to, and the money advanced under this arrangement. The firm was sued for the money so loaned. *Held*, that there was no privity between the plaintiff and defendants on which to establish the relation of debtor and creditor. That McL., as agent of plaintiff, had no authority to loan the money to the defendants, and it can only be regarded as an advance by one partner to the partnership concern, for which they are liable to him, and that McL. alone is liable to plaintiff. *Evans v. Bidleman*, 435.

DECREE.

See NUISANCE, 7.

DEED.

1. **DEED, DESCRIPTION IN.**—A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but one lot in the place, is not void for uncertainty in the description. *Lick v. O'Donnell*, 59.
2. **CONVEYANCE, WHEN GRANTEE TAKES AS TENANT IN COMMON.**—But if such deed is not void, it can only convey an undivided half of the said lot, and the grantee can only take as tenant in common with the grantor. *Ib.*
3. **CONVEYANCES, INTENT OF STATUTE.**—The evident intention of the statute providing for the proof and registration of conveyances, is to protect subsequent purchasers, without notice, either actual or constructive. *Call v. Hastings*, 179.
4. **NEGLECT, WHEN A LEGAL FRAUD.**—At common law, negligence in a prior purchaser or mortgagee, such as leads to imposition upon an innocent party, is regarded as a legal fraud. *Ib.*
5. **CONSTRUCTIVE NOTICE, STATUTE CONSTRUED.**—The doctrine of constructive notice has always been regarded as a harsh necessity; and the statutes which create it have always been subjected to the most rigid construction. *Ib.*
6. **MORTGAGE, LOSS OF PRIORITY BY FAILURE TO RECORD.**—A mortgage made anterior to the passage of the act concerning conveyances, was not recorded in accordance with the provisions of the 41st section of the said act. *Held*, that it lost its priority as against a subsequent purchaser without notice. *Ib.*

See EVIDENCE; ESTOPPEL, 1, 2; MEXICAN TITLES, 1-5, 11, 12; SHERIFF AND SHERIFF'S SALES, 1.

DEFENCE.

See JUDGMENT, 1; PLEADING, 8.

DELIVERY.

1. **DELIVERY BY ORDER, WHEN EFFECTUAL.**—A delivery of an order for goods is only considered as a delivery of the goods themselves, where they are susceptible of an immediate delivery. *Stevens v. Stewart*, 140.
2. **DELIVERY BY ORDER AND BILL OF SALE.**—The plaintiff contracted with defendant for certain goods on board a vessel, and delivered to him a bill of sale and an order on the captain of the vessel for the delivery of the goods. When defendant presented the order, he was informed that the goods could not be discharged for some time, to which defendant replied that he would then have nothing to do with

them, and nine days elapsed before they were discharged, of which defendant had notice, but refused to take them, and pleaded the Statute of Frauds. The Court below charged the jury that the bill of sale and order took the case out of the Statute of Frauds. *Held*, that this was error. *Ib*.

See STATUTE OF FRAUDS, 1, 2.

DEMAND.

See LEASE, 3.

DEMURRER.

See APPEAL, 2; PLEADING, 2, 5, 7, 14.

DEPOSITIONS.

1. DEPOSITION, OBJECTION TO, WHEN TO BE TAKEN.—A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial. *Mills v. Dunlap*, 94.
2. IDEM, DECISION ON MOTION IN DISCRETION OF COURT.—The decision of such motion rests in the sound discretion of the Court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made. *Ib*.
3. IDEM, PAROL PROOF OF NOTICE.—Proof of notice to take a deposition where the written notice was defective, was held good, when made by parol, and it conforms substantially to the statute. *Ib*.
4. NOTICE, VALIDITY OF.—A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Ib*.
5. CERTIFICATE OF NOTARY AS EVIDENCE.—The certificate of the notary as set forth in the case was sufficient. *Ib*.

DESCRIPTION OF LAND.

See DEED, 1; MEXICAN TITLES, 15.

DISTRICT COURT.

See APPEAL, 4, 5, 6, 12, 13, 16, 19; COURTS, 1, 9, 10; JUDGMENT, 1; JURISDICTION, 2, 8; REMITTITUR, 3.

DISTRICT JUDGE.

See ELECTION, 1.

DIVORCE.

1. PARTIES IN ACTION FOR DIVORCE.—The wife, in a suit for divorce, may make a party of any one claiming an interest in the common property. *Kashaw v. Kashaw*, 312.
2. IDEM, DOMICIL.—Where the husband had been a resident of this State since 1850, and had his domicile in San Francisco, and the wife followed him and arrived here, and commenced this suit before six months had elapsed after her arrival: *Held*, that the domicile of the husband is the domicile of the wife, and that, in contemplation of law, the plaintiff must be considered as having been a resident of this State continuously from the time her husband arrived here. *Ib*.

See HUSBAND AND WIFE, 9.

DOMICIL.

See DIVORCE, 2.

ELECTION.

1. **ELECTIVE OFFICE, APPOINTMENT TO VACANCY IN.**—The Legislature having created the Tenth Judicial District, and not having appointed a Judge therefor, the Governor, on the 1st May, 1851, appointed the respondent, who was duly qualified. The relator, on the 10th October thereafter, received a commission from the Governor as Judge of said District, having been elected by the people at the September general election of the same year, and was duly qualified. The relator appeared in court at the October Term, and the respondent being on the bench, claimed the right to exercise the duties of Judge of the Court. The Court decided that he had no such right, the respondent claiming to hold under his appointment and commission from the Governor until the election and qualification of a District Judge in September, 1852: *Held*, that the relator is rightfully entitled to the said office. *People v. Mott*, 502.

See OFFICE AND OFFICER, 1, 2; SAN FRANCISCO, 1.

EMINENT DOMAIN.

See NUISANCE, 3, 4.

EQUITY.

See BAIL, 1; COURTS, 1, 2, 3, 5; DEBTOR AND CREDITOR, 1, 2; PARTNERSHIP, 1; PLEADING, 10; TENANTS IN COMMON.

ERROR.

1. **MUST AFFIRMATIVELY APPEAR.**—Error which is relied upon, must be shown clearly and affirmatively. *Rabe v. Wells*, 148.
2. **APPEAL, ERROR MUST AFFIRMATIVELY APPEAR ON RECORD.**—To disturb a judgment of a Court of original jurisdiction, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *White v. Wentworth*, 426.
8. **IDEM, WHAT INSUFFICIENT TO SHOW ERROR.**—The naked direction of a Court, unaccompanied with any statement of facts, cannot support allegations of error: they may be in reference to the facts merely abstract, or inapt to mislead the jury. *Ib.*

See EVIDENCE, 1, 2, 8; INSTRUCTIONS, 1, 2, 4; VARIANCE; WITNESS, 3.

ESTATES OF DECEASED.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

ESTOPPEL.

1. **ESTOPPEL, BY DEED.**—A party is not allowed to controvert the declaration he has made by deed. *Turtar v. Hall*, 263.
2. **IDEM, BY MORTGAGE.**—The defendant bought of the plaintiff a presumption right to a tract of land, the title to which was in the United States, took a deed for it, and gave his note for the purchase-money, secured by his mortgage of the premises conveyed. The plaintiff brought suit for the recovery of the note and mortgage, and defendant pleaded want of consideration. *Held*, that the mortgage operated an estoppel to the defence set up. *Ib.*

3. **ESTOPPEL, WHO BOUND BY.**—Although it is generally true that estoppels bind only parties and privies, yet even parol admissions may be conclusive, where they have had the effect of inducing another to alter his condition. *Hosler v. Hays*, 302.
4. **IDEM, BY DECLARATIONS OF PARTY.**—P., in possession of a vessel, appoints a master. The plaintiff (who sets up a claim to the vessel) entered into a charter-party with P., and by it acknowledges him to be owner, and H., the master appointed by P., to be master of the vessel. After the charter-party, the declared owner of the vessel became the debtor of the master, who attached the vessel for his debt. The plaintiff brought this action against the sheriff, to recover the vessel held under the attachment. *Held*, that where one permits another to deal with his property as if it belonged to the latter, and by his declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making them must be concluded. *Id.*
5. **IDEM, REPRESENTATIONS OF PARTY CONCLUSIVE.**—In such cases the party is estopped, on grounds of good faith and public policy, from repudiating his own representations. *Id.*

See FRAUD; JUDGMENT, 1; PLEADING, 8.

EVIDENCE.

1. **PRELIMINARY PROOF REQUIRED.**—It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents. *Sinclair v. Wood*, 98.
 2. **EVIDENCE, INCOMPETENT TO PROVE PARTNERSHIP.**—It is error to admit evidence to prove partnership by general reputation. *Id.*
 3. **PARTNERSHIP, NOTICE OF DISSOLUTION.**—The question of notice of the dissolution of a partnership, is a fact for the jury, under the charge of the Court. *Rabe v. Wells*, 148.
 4. **PROOF OF HANDWRITING, WHEN ADMISSIBLE.**—To admit proof of the handwriting of a witness to an instrument, it must be shown that the witness is beyond the jurisdiction of the Court, or that he could not be found after diligent search for him had been made; that his absence may be inferred. *Powell's Heirs v. Hendricks*, 427.
 5. **SECONDARY EVIDENCE.**—The act of 1851, sec. 21, gives to papers properly recorded the like effect as the originals, but it does not dispense with proof of execution. *Id.*
 6. **IDEM, OFFICIAL CERTIFICATE, WHEN NOT EVIDENCE.**—The certificate of a tax-collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence, where the tax-collector himself can be called as a witness. *Id.*
 7. **IDEM, WHEN ADMISSIBLE.**—In his absence, his receipt for taxes, with proof of its execution, would be admissible. *Id.*
 8. **EVIDENCE, BOOKS OF ACCOUNT.**—It was error to reject the books of the defendants offered to prove the account of the sales. *Lubert v. Chavilleau*, 458.
- See ARBITRATION AND AWARD, 1; ARREST, 1; CONTRACT, 4, 5; CRIMINAL LAW, 1; DAMAGES, 5, 6, 10; DEPOSITIONS, 1, 3-5; ESTOPPEL, 4; VARIANCE.

EXCEPTION.

See VERDICT, 4.

EXECUTION.

1. **LIABILITY OF SHERIFF FOR WRONGFUL SEIZURE.**—Where an order of Court directed the sheriff to seize certain specific property, and this property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. *Rhodes v. Patterson*, 469.
2. **IDEM, REMEDY OF OWNER OF PROPERTY.**—The owner of property has his remedy and the right of recovery, against any one, whether sheriff or not, unless it be held by legal process against himself. *Ib.*

See ATTACHMENT, 4, 5; CONTRACT, 5; REMITTITUR, 2, 3, 5.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS, COMPENSATION OF.**—Section 222 of the act to regulate the settlement of the estates of deceased persons allows compensation to the executors, according to the rates established, upon the whole value of the estate, both real and personal; but this rule only applies where the administration is complete, and the estate is finally settled. *Ord v. Little*, 287.
2. **IDEM, APPORTIONMENT OF COMPENSATION.**—Where the administrator resigns, or is removed, leaving the administration incomplete, there is no fixed rule of compensation. The Probate Court should apportion it, in reference to the compensation fixed by law for the whole, according to sound judgment. *Ib.*

FACTOR.

See ACTION, 5; DAMAGES, 9; PLEADING, 15, 16.

FERRY.

1. **FERRY RIGHTS, ALLEGATIONS IN ACTIONS FOR VIOLATION OF.**—In an action brought to recover damages by the owners of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family, and that the omission of these allegations was fatal. *Hanson v. Webb*, 236.

See APPEAL, 4; JUDGMENT, 1.

FINDINGS.

1. **FINDINGS, FACTS AND CONCLUSIONS HOW STATED.**—The Court below, sitting as a jury, must find *separately* the facts and conclusions of law. A verdict insufficient in this particular will be reversed. *Brown v. Groves*, 111.
2. **IDEM, RULE WHEN NOT TO APPLY.**—But this rule does not apply to a judgment by default against one defendant, where there are two, and the other goes on to trial. *Ib.*
3. **FINDINGS BY THE COURT, EFFECT OF.**—When a jury has been waived by the parties, and the Court find the facts, the facts so found have the same legal effect as if found by a jury, and not being the subject of review in this Court are therefore conclusive. *Wheeler v. Hays*, 284.
4. **FINDING MUST SUPPORT JUDGMENT.**—Where the declaration was upon a note, and there was but one count, and the Court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: *Held*, that the finding was against the averment, and could not support the judgment. *Lewis v. Myers*, 475.

See REFERENCE, 4, 5, 6.

FIRE.

See NUISANCE, 1, 2, 3.

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—DEMAND.**—By the 13th section of the act, concerning forcible entries and unlawful detainers, it was the intention of the Legislature to make the non-payment of rent work a forfeiture of the estate of the tenant. But to effect this, the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chipman v. Emeric*, 273.
2. **IDEM.**—Where the record shows no demand of the rent, there can be no forfeiture. *Ib.*

See TENANTS IN COMMON.

FOREIGN MINER'S LICENSE.

See MINES AND MINING CLAIMS, 4; PARTNERSHIP, 3.

FORFEITURE.

1. **FORFEITURE OF ESTATE FOR YEARS.**—At common law there was no forfeiture of an estate for years, for the non-payment of rent, nor for the commission of waste. *Chipman v. Emeric*, 273.
2. **IDEM, FOR WASTE.**—By the Statute of Gloucester, 6 Ed. 1, the remedy of forfeiture was given for waste, and it was expressly confined to the place wherein the waste was committed. *Ib.*
3. **IDEM, STATUTORY CONSTRUCTION.**—The Statute of California confines the remedy to the recovery of treble damages. *Ib.*

See FORCIBLE ENTRY AND DETAINER, 1, 2; LEASE, 2.

FRAUD.

1. **FRAUD, DEFENCE NOT WAIVED BY RECEIPT OF PAYMENT.**—On a bill for specific performance, defendant alleged fraud in the contract sued upon, but admitted payment of the consideration-money under protest affirming the fraud: *Held*, that the receipt of payment was no waiver of the defence, and that defendant was not estopped from showing the fraud, and that it was error in the Court not so to instruct the jury when requested. *Russel v. Amador*, 400.

See ARREST, 1, 2; COURTS, 3; DEED, 4.

GAMING.

1. **GAMING DEBT NOT RECOVERABLE.**—No action will lie to recover money lost at gaming. *Carrier v. Brannan*, 328.
2. **IDEM, NOT LEGALIZED BY LICENSE ACT.**—Gaming debts have not been legalized by the operation of the act of the Legislature licensing gaming houses. *Ib.*
3. **IDEM, EFFECT OF ACT.**—The license simply operates as a permission, and removes the misdemeanor at common law, without changing the character of the contract. *Ib.*
4. **IDEM, OBJECT OF ACT.**—The object of the Legislature in passing the act was to control gaming within certain bounds, by imposing restrictions and burdens upon persons carrying on this kind of business. *Ib.*
5. **GAMING LICENSE, NOT RECOVERABLE BY ACTION.**—An action cannot be maintained against the keeper of a common gaming-house to recover the amount required by law for a license which he neglected to obtain. *People v. Raynes*, 366.

6. **IDEM, LIABILITY ON FAILURE TO PROCURE.**—The failure to obtain a license leaves the party as he would have been at common law, a public wrong-doer, and subject to indictment and punishment. *Ib.*

GARNISHEE.

1. **ATTACHMENT, WHEN GARNISHEE SHOULD BE DISCHARGED.**—Where a garnishee, in discharge of a rule, answers on oath, that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the Court without further delay, unless his answer is controverted by the affidavit of the plaintiff. *Ogden v. Mills*, 253.
2. **IDEM, WHAT OPERATES AS DISCHARGE OF.**—And where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared, to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. *Ib.*

GRANTOR AND GRANTEE.

See MEXICAN TITLE.

HUSBAND AND WIFE.

1. **PARTIES, MARRIED WOMAN.**—The Practice Act gives to a married woman the right to sue without her husband, where the action concerns her separate estate. *Snyder v. Webb*, 83.
2. **MARRIED WOMAN, SEPARATE PROPERTY OF.**—Under the act, property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property. *Ib.*
3. **IDEM, COMMON PROPERTY.**—The rents and profits of the separate property are declared to be common property. *Ib.*
4. **HUSBAND AND WIFE, STATUTE CONSTRUED.**—The act governs if there be no marriage contract containing stipulations contrary thereto. *Ib.*
5. **MARRIAGE, STIPULATIONS AS TO PROPERTY.**—The act confers on the parties, before marriage, an unlimited right to make whatever stipulations they may agree upon in respect to property, and this is not confined to property *in esse*, but contemplates property to be acquired, and the rents and profits of the present estate. *Ib.*
6. **MARRIED WOMAN, RIGHTS OF, HOW SECURED.**—Our statute does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects, the common law remains unaltered, and the wife may resort to trustees for all purposes of security. *Ib.*
7. **HUSBAND, WHEN REGARDED AS TRUSTEE OF WIFE.**—If the husband should take the rents and profits of her estate, he will be held to account for her benefit, to the same extent as if he had undertaken a specific trust. *Ib.*
8. **MARRIED WOMAN, DISABILITY TO CONTRACT.**—The law which deprives a married woman of the right to make contracts is not altered by the statute, unless in respect of the property specified by it, and she cannot bring suit in her own name upon a contract which she was not authorized by the statute to make. *Ib.*
9. **IDEM, DIVISION OF COMMON PROPERTY.**—Upon the dissolution of a marriage by a Court of competent jurisdiction, the act, in relation to husband and wife, directs that the common property shall be equally divided between the parties, and that the Court granting the decree shall make such order for the division

thereof. *Held*, that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and one of the proper subjects of the action. *Kashaw v. Kashaw*, 312.

10. *IDEM*, COMMON PROPERTY, PRESUMPTIONS AS TO.—In the absence of an allegation that there is common property, the presumption would be that there was none. *Ib.*
11. *IDEM*, ALLEGATION OF.—And it is proper to declare, for the information of the Court, in what the common property consists, its nature, and value. *Ib.*

See DIVORCE, 1, 2; PARTIES, 1, 2.

INJUNCTION AND INJUNCTION BOND.

1. *INJUNCTION, COUNSEL FEES AS DAMAGES*.—In an action upon an injunction bond to recover damages for the wrongful issuing of the writ, it was held, that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as part of the damages. *Ah Thais v. Quan Wan*, 216.
2. *INJUNCTION BOND, ACTION ON*.—In an action on an injunction bond, the judgment of dissolution is conclusive, and the only question is the amount of damage sustained. *Gelston v. Whitesides*, 309.
3. *IDEM, WHAT MUST BE SHOWN*.—But where an injunction is dissolved, and the suit in which it issued is dismissed by the action of the party, this is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Ib.*
4. *INJUNCTION, WHAT MUST BE SHOWN*.—Where the petition set forth a lease and contract to pay rent in kind, by defendant to plaintiff, and that defendant had refused payment of the rent, and was removing the crop with intent to defraud plaintiff of his share due for rent, and asked for an injunction to restrain him: *Held*, that in this case, it was necessary, to obtain an injunction, for the bill to aver, either the insolvency of the defendant, or that he was without tangible property which could be made the subject of attachment or execution; and the bill being defective in both particulars, the order for an injunction could not be sustained. *Gregory v. Hay*, 332.

See NUISANCE, 8, 9, 10; PLEADING, 12.

INSOLVENT.

See ASSIGNMENT, 1.

INSTRUCTIONS.

1. *INSTRUCTIONS IN ACTION FOR MALPRACTICE OF SURGEON*.—Where the action was brought against surgeons "for malpractice, by reason of which amputation became necessary," it was held to be error for the Court to instruct the jury, "that if they believe, from the evidence, that the defendants were guilty of negligence, carelessness, or inattention, in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." *Moor v. Teed*, 190.
2. *INSTRUCTIONS IN ACTION FOR USE AND OCCUPATION*.—In an action for use and occupation, the Court was asked to instruct the jury "that it was necessary, to enable the plaintiff to recover, that he should show, that the defendant used and occupied the premises by the permission of the plaintiff; and if the jury believe defendant used and occupied the same against the will of the plaintiff, that they

must find a verdict for the defendant;" which the Court refused. *Held*, that in this the Court erred. *Sampson v. Sharfer*, 196.

3. **INSTRUCTIONS, PRACTICE ON GIVING OR REFUSING.**—The Court must give or refuse the instructions asked for, and no modification which alters the meaning or might mislead the jury can be substituted. *Russel v. Amador*, 400.

INSTRUCTIONS ERRONEOUS.—And in such action, it was error for the Court to charge the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, and that defendants were liable for the value of the goods at the time of demand made. *Lubert v. Chaviteau*, 458.

See **CONTRACT**, 5; **DELIVERY**, 2.

INTEREST.

MORTGAGE, INTEREST, RATE OF.—Where the assignee of a mortgage upon premises, the buildings upon which were destroyed by fire, agreed to waive his lien in favor of one who had agreed to advance money to rebuild, but no agreement was made at the time as to interest: *Held*, that the guarantee of the assignee extended no further than the contract when made, and as this was silent as to interest, that a higher rate of interest than the law allowed, where the rate was not agreed upon by the parties, could not be allowed. *Godfrey v. Caldwell*, 101.

2. **INTEREST, COMPUTATION OF.**—Upon a money demand bearing interest, on which payments have been made after maturity, the proper method of computing interest is stated by Chancellor Kent, in *Connecticut v. Jackson*, 1 Johns. Ch. Rep. 13. *Buckus v. Minor*, 231.
3. **IDEM, ACCOUNT STATED.**—But where an account has been stated by the plaintiff, charging interest both on the debt and the payments, and rendered to the defendant, and no objection made thereto within a reasonable time, it is the same as an agreement that the interest should be computed accordingly. *Ib.*
4. **IDEM, MODE OF COMPUTATION WHEN BINDING.**—When the dealings of the parties extended through a period of more than two years, during which time several accounts were rendered by plaintiffs to defendant, and the same mode of computing interest was pursued throughout, this mode was held to be binding upon them. *Ib.*

JUDGMENT.

1. **JUDGMENT, NOT SUBJECT TO COLLATERAL ATTACK.**—The Court of Sessions granted a license to defendant to run a ferry. This grant was resisted by plaintiff, who took an appeal to the District Court, who affirmed the grant; which judgment remained unreversed. This action was brought to recover damages from defendant for running the ferry; the plaintiff alleging that the license was illegally granted. *Held*, that the judgment of the District Court was a bar to this action, and that that judgment could not be impeached collaterally. *Webb v. Hanson*, 103.
 2. **IDEM.**—When the judgment of the District Court, confirming such license, is unreversed, it cannot be tried collaterally. *Webb v. Hanon*, 65.
- See **AMENDMENT**, 2; **APPEAL**, 4, 5, 7, 18, 20; **BAIL**, 1; **COURTS**, 1, 5, 6, 7, 8; **DAMAGES**, 8; **FINDINGS**, 2; **INJUNCTION**, 1; **REFERENCE**, 3; **REMITTITUR**, 2, 4, 5; **SHERIFF AND SHERIFF'S SALE**, 2.

JURISDICTION.

1. **JURISDICTION OF STATE COURTS.**—If the Courts of this State can entertain jurisdiction of titles to land granted by a Mexican governor, antecedent to the acquisition of the country by the United States, without previous confirmation or legislative recognition? *Leese v. Clarke*, 17.

2. **DISTRICT COURT, CONSTITUTIONAL JURISDICTION.**—The jurisdiction of the District Court is confirmed and defined by the constitution, and no statute can deprive it of its powers. *Hicks v. Bell*, 219.
3. **IDEM, IN CASES RESPECTING MINING CLAIMS.**—Although the jurisdiction of mining claims is given to Justices of the Peace, that of the District Court remains unaffected, if the amount in controversy exceeds \$200. *Ib.*

See CERTIORARI, 1, 2; SUMMONS, 5

JUROR AND JURY.

1. **JUROR, QUALIFICATION OF.**—To render a person competent to act as a juror, he must be an elector of the county in which he is returned, and have resided in the county thirty days. *Sampson v. Shaeffer*, 107.

JUSTICE OF THE PEACE.

See PUEBLO LANDS, 12; SUMMONS, 4.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT, TERMINATION OF TENANCY.**—Where the defendant held as tenant under J. S. in his lifetime, under whom, as his heir-at-law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such: *Held*, that this refusal terminated the tenancy, and overweighed the presumption of a contract between him (defendant) and the plaintiff. *Sampson v. Shaeffer*, 196.
- See ACTIONS, 1, 2, 3, 4; FORCIBLE ENTRY AND DETAINER, 1, 2; FORFEITURE, 1; INJUNCTION, 4; LEASE, 2, 3; MORTGAGE, 2.

LEASE.

1. **LIEN ON LEASEHOLD INTEREST.**—Where a lien attaches upon a leasehold interest, it so attaches, subject to all the conditions of the lease. *Gaskill v. Trainer*, 334.
2. **LEASE, DEMAND FOR RENT NECESSARY TO CREATE FORFEITURE.**—But if one of the conditions be forfeiture for non-payment of rent, the mere failure to pay the rent will not make a forfeiture: there must be a formal demand made on the day it becomes due, to effect this. *Ib.*
3. **IDEM, WAIVER OF DEMAND NOT IMPLIED.**—A waiver of the demand will never be implied for the purpose of making a forfeiture; for, from its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law. *Ib.*
4. **IDEM, SURRENDER OF LEASEHOLD INTEREST.**—The surrender of a leasehold estate operates a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect. *Ib.*

See CONTRACT, 2; LIEN, 2; MORTGAGE, 2.

LICENSE.

See GAMING, 2, 3, 4, 6; PARTNERSHIP, 6.

LIEN.

1. **LIEN, OWNER OF CHARTERED VESSEL.**—The owner of a chartered vessel has no general lien upon the cargo for the charter price. *Mayo v. Stansbury*, 465.
2. **LIEN ON LEASEHOLD INTEREST, ENFORCEMENT OF.**—The party holding a lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent, and a surrender of the lease to the lessor. *Gaskill v. Trainer*, 334.

See LEASE, 1, 2, 3, 4; MECHANIC'S LIEN, 1, 2.

MANDAMUS.

1. **MANDAMUS, WHEN IT LIES.**—A mandamus will not lie where there is any other specific, speedy, and adequate remedy. *People v. Olds*, 167.
2. **IDEM, WHEN ISSUED.**—The statute of this State is a re-affirmance of the principles of the common law, as regards the writ of mandamus, and sec. 468 provides, that it shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law—*e converso*, it shall issue in no other. *Ib.*
3. **MANDAMUS, REMEDY BY.**—A mandamus can give no right, but may be resorted to to put a party in a position to assert his right. *Ib.*
4. **IDEM, WHEN WILL NOT LIE.**—It will not lie where the office claimed is full, or against an incumbent *de facto*, unless the party be without remedy. *Ib.*
5. **MANDAMUS AND QUO WARRANTO DISTINGUISHED.**—The distinction between the writs of mandamus and *quo warranto*, as held in England, is not abolished by the statutes of this State, but, on the contrary, is recognized. *Ib.*
6. **MANDAMUS, EFFECT OF DEMURRER.**—An application for a mandamus set forth as the ground of this application certain services and a claim for compensation, performed under the authority of an act of the Legislature, by plaintiff, and that he had submitted his account to defendants (appointed by law to audit and allow like accounts) to be audited and allowed, who had refused to act in the premises. Defendants demurred to the application, and alleged as ground that they did not see fit to allow the claim for compensation, which was a matter of discretion for them. *Held*, that the effect of the demurrer was to admit the truth of the facts alleged, and that while defendants had discretionary power to determine the amount of compensation, they cannot be permitted, in the same breath, to admit the right to compensation, and then refuse to grant it. *Selkirk v. Sacramento County*, 323.

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN, STATUTE CONSTRUED.**—The statute of April 12th, 1850, "To provide for the lien of mechanics and others," has placed liens for *materials*, and liens for *labor*, on the same footing; and it is error in the Court to refuse to distribute the proceeds in conformity to the statute. *Moxley v. Shepard*, 64.
2. **MECHANIC'S LIEN, WHAT SUBJECT TO.**—The statute of 1850, providing for the lien of mechanics and others, limits the *structures* on which parties can obtain such lien, to *buildings and wharves*. Under this act, no such lien could be had on bridges. *Burt v. Washington*, 246.

See LEASE, 1, 2, 3, 4; LIEN, 2.

MEXICAN LAW.

See MEXICAN TITLES; PUEBLO LANDS, 1, 2.

MEXICAN TITLES.

1. **MEXICAN GRANTS, TESTS OF VALIDITY.**—Prior to the 24th May, 1821, the laws or decrees of the kings of Spain, and the regulations or usages of their governors, (who were mere deputies,) sanctioned by royal approval or acquiescence, afforded the proper tests by which to determine the validity of grants. *Leese v. Clarke*, 17.
2. **IDEM—AUTHORITY TO MAKE.**—Since the revolution, (24th February, 1821,) no valid alienation could be made, except by an act of Mexican sovereignty. *Ib.*

3. **IDEM—MEXICAN LAW.**—By the law of the Mexican Congress of 18th August, 1824, limited and defined by that of November 21st, 1821, the governors of territories were authorized to grant, with certain specific exceptions, vacant lands, etc. By these laws and the legislation of the departmental legislature, consistent therewith, must be determined the validity of any grant of land in California. *Ib.*
4. **IDEM—VALIDITY OF GRANT, HOW DETERMINED.**—To these regulations this Court alone look, and by them every grant must be determined. If not fully complied with, the title did not pass, but remained in the government of Mexico. *Ib.*
5. **IDEM—TITLE WHEN INCHOATE.**—A mere grant, without further compliance with the requisitions, is at best but an inchoate title, and the land passed to the United States, who hold it subject to the trust imposed by the treaty of cession and the equities of the grantees. *Ib.*
6. **TREATY, EXECUTION OF TRUST UNDER.**—The execution of this trust is a political power to which the judiciary is not competent. *Ib.*
7. **EJECTMENT, TITLE INSUFFICIENT TO MAINTAIN.**—Where the title of the plaintiff is inchoate and incomplete, he cannot sustain an ejectment, and the Court properly excluded such title as testimony. *Ib.*
8. **MEXICAN GRANT, VALIDITY HOW TESTED.**—A grant of land made while the country was under the dominion of Mexico, must be tested by the rules of law which then prevailed. The cession to the United States has worked no change in the legal rights of private persons. *Vanderslice v. Hanks*, 27.
9. **IDEM, POWER TO MAKE GRANT.**—The power of the Mexican Government to grant land is derived from the Congressional decree of 1824, and the regulations of 1828. *Ib.*
10. **IDEM, PRESUMPTIONS AS TO OFFICIAL ACTS.**—When the regulations require that a grant shall not be held to be sufficiently valid without the previous consent of the Territorial Deputation (legislature,) and provides that the definitive grant being made, a document signed by the governor shall be given to serve as a title to the grantee, and the governor delivers the title, the presumption arises that the governor fulfilled his duty, and that the grant had the approval of the legislature, and if the contrary be asserted, it must be shown by proof. *Ib.*
11. **IDEM.**—Nor is this view weakened by the words in the deed, "subjecting himself (the grantee) to the approbation of the most excellent departmental assembly." *Ib.*
12. **IDEM, IN CASE OF LOST RECORDS.**—And is strengthened in view of the disordered state of the country, the irregularity of legislative proceedings, and the absence or loss of these records. *Ib.*
13. **IDEM, APPROVAL A CONDITION SUBSEQUENT.**—If it was the duty of the grantor to obtain the legislative approval, and the governor, who had the sole power, having exercised it, and made the grant, the necessity of obtaining their approval was a condition subsequent to the grant. *Ib.*
14. **IDEM, WHEN GRANT BECOMES ABSOLUTE.**—A grant made on a condition subsequent where no time is limited for its performance, and the condition becomes impossible, the grant becomes single and absolute in the grantee. *Ib.*
15. **IDEM, NO FORFEITURE ON FAILURE OF SURVEY.**—When the land granted is described by specific boundaries, and the deed is accompanied by a diagram or plot, which it expressly mentions as descriptive, although more land is contained within the description than the quantity called for by the grant, and a judicial survey is required to be made by the grantee, the failure to procure such survey works no forfeiture: it can be made at any time. *Ib.*

16. **IDEM, TITLE TO SURPLUS LAND.**—When such grant contains a surplus, the title is good for the whole lot, but defeasible for the surplus. *Ib.*
17. **IDEM, DENOUNCEMENT OR FORFEITURE.**—If the grantee neglect the directions imposed by the grant, his land may be *denounced* and granted to another; or it may be forfeited to the government; but in the absence of denouncement or forfeiture, his right to the whole is good against the world. *Ib.*
18. **IDEM, PUEBLO LAND GRANTS.**—To sustain a grant from a town, it is necessary to show that the lands granted were the property of the town. *Ib.*
19. **EVIDENCE, ADMISSION OF HEARSAY AS TO BOUNDARIES.**—Hearsay evidence, with regard to boundaries of parishes or towns, is only received where such boundary is of remote antiquity; and query, if ever it should be received to affect a private right. *Ib.*
20. **MEXICAN GRANT, PROOF OF.**—The grant bears upon its face the condition, that the grantee shall subject himself to the confirmation of the territorial legislature. The acts of a legislative body are susceptible of proof, either by records or parol proof, and cannot be presumed. *Ib.*
21. **IDEM, WHAT NECESSARY TO VALIDITY OF.**—By the language of the Instructions of 1821, "the grant asked for shall not be definitively valid, without the previous consent of the territorial deputation, and the *expedientes* shall be forwarded to it." *Ib.*
22. **IDEM, CONDITIONS TO BE COMPLIED WITH.**—These conditions must be complied with to vest in the grantee a complete legal title, without which an ejectment will not lie. *Ib.*
23. **TREATY, SOVEREIGN RIGHTS UNDER.**—The rights of Mexico passed to the United States, and Congress, in the exercise of its political power, has control over Mexican grants, in cases where the absolute fee has not been passed to the grantee, and for their protection the United States has pledged her faith by solemn treaty. *Ib.*

MINES AND MINING CLAIMS.

1. **MINING CLAIM, CONSTRUCTIVE POSSESSION.**—Actual possession of a portion of a mining claim, according to the custom of miners, in a given locality on the Yuba River, extends by construction to the limits of the claim, held in accordance with such customs. *Hicks v. Bell*, 219.
2. **UNITED STATES AS PROPRIETOR OF PUBLIC LANDS.**—The United States, as owner of land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from State taxation. *Ib.*
3. **STATE SOVEREIGNTY OVER MINERAL LANDS.**—The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors. *Ib.*
4. **IDEM, MINER'S LICENSE.**—The State, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and to affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

See JURISDICTION, 3; PARTNERSHIP, 6.

MOTION.

See DEPOSITIONS, 1.

MORTGAGE.

1. MORTGAGE, SUBROGATION OF PURCHASER.—The purchaser of a mortgage is subrogated to the rights of the mortgagee. *Johnson v. Dopkins*, 391.
2. *IDEM*, PURCHASER OF MORTGAGOR'S INTEREST.—Defendant set up title in herself as assignee of the mortgagee, and as lessee of the mortgagor. The plaintiff claims as purchaser at sheriff's sale on a judgment against the mortgagor. The estate in controversy was leasehold, and the judgment of the plaintiff was obtained after the date of the lease: *Held*, that the plaintiff took but the equity of redemption of the mortgagor, subject to the lease of defendants; and *held*, that he had no right to demand possession of the lessee till after the expiration of the lease, and could recover no higher rent than that fixed by the lease, up to the time he demanded possession, after the expiration of the lease. *Ib.*
3. ACTION, WHEN PREMATURE.—No account was stated in the case, and the cause was remanded, that an account might be taken; and the Court remarked that if it shall appear by the above rule of computation that the rents were insufficient to have paid the mortgage debt of the lessee at the time this suit was brought, then that it was premature, and must fail. *Ib.*

See DEED, 6; ESTOPPEL, 2.

MUNICIPAL LANDS.

See PUEBLO LANDS, 5.

NEGLIGENCE.

See ATTORNEY AND COUNSEL, 1; DEED, 4; INSTRUCTIONS, 1; RAILROAD

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTES; SET-OFF.

NEW TRIAL.

1. NEW TRIAL, NEWLY-DISCOVERED EVIDENCE, SHOWING REQUIRED.—An application for a new trial on the ground of newly-discovered evidence, must show affirmatively that the evidence is new, material, and not cumulative; that the applicant has used due diligence in preparing his case for trial; that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not directly in issue on the trial, or were not then known or investigated by proof. *Bartlett v. Hogden*, 55.
2. NEW TRIAL, ON GROUND OF SURPRISE.—Where a slight degree of prudence would guard against surprise, it is not a sufficient ground to allege for a new trial. *Brooks v. Lyon*, 113.
3. *IDEM*, WHAT AFFIDAVIT SHOULD STATE.—The affidavit did not state, that the newly-discovered evidence was discovered since the trial, nor in what particular it would be material, nor what important fact it would tend to establish, nor that due diligence was used, nor why it could not with reasonable diligence have been discovered and produced at the trial of the cause. *Held*, that a new trial was properly refused. *Ib.*
4. NEW TRIAL, ON NEWLY-DISCOVERED EVIDENCE.—An application for a new trial on the ground of newly-discovered evidence must state sufficient facts to warrant it. *Burrill v. Gibson*, 396.

See APPEAL, 3, 14; STATEMENT; REMITTITUR, 2.

NONSUIT.

1. NONSUIT, WHEN SHOULD BE GRANTED.—Where the plaintiff fails to appear and prosecute his suit, and defendant moves a nonsuit, the Court has no alternative but to grant it. *Peralta v. Marica*, 185.

See APPEAL, 15.

NOTICE.

See DEPOSITIONS, 4; EVIDENCE, 3; PARTNERSHIP, 5.

NUISANCE.

1. NUISANCE, RIGHT TO STOP CONFLAGRATION.—A person who tears down or destroys the house of another in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, is not personally liable in an action by the owner of the property destroyed. *Surocco v. Geary*, 69.
2. NUISANCE, HOUSE ON FIRE CONSTITUTES.—A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate, and the private rights of the individual yield to considerations of general convenience and the interests of society. *Ib.*
3. CONSTITUTIONAL LAW, COMPENSATION ON CONDEMNATION.—The constitutional provision, that requires payment for private property taken for public use, does not apply in such case. This right belongs to the State, in virtue of her right of eminent domain. *Ib.*
4. IDEM, PROPERTY WHEN NOT TAKEN FOR PUBLIC USE.—The property thus taken was not a taking for public purposes, but a destruction for individual benefit, or for the city, and not for the State. *Ib.*
5. TRESPASS, WHEN PARTY LIABLE FOR.—The necessity for such act of destruction must be clearly shown. But in all such cases the individual must be regulated by his own judgment; and if done without actual or apparent necessity, he is liable in trespass. *Ib.*
6. DAMAGES FOR PROPERTY DESTROYED.—The plaintiff cannot recover for the value of the goods in the house which he might have saved: these are equally liable to the necessities of the occasion with the house in which they are placed. *Ib.*
7. NUISANCE, DECREE IN ABATEMENT OF.—Where a nuisance, by overflowing plaintiffs' mining claim by means of a dam erected by defendants, was found, the decree should have ordered such a reduction of the dam as would have prevented any overflow, from that cause, of the plaintiffs' ground; or, if necessary, an entire abatement. *Ramsay v. Chandler*, 90.
8. INJUNCTION, WHEN ALLOWED.—And a perpetual injunction to restrain the defendants from raising their dam higher than the point designated was allowed. *Ib.*
9. INJUNCTION IN CASES OF NUISANCE.—To entitle a party to an injunction in a case of nuisance, the injury to be restrained must be such as cannot be adequately compensated by damages; or it must be irremediable or lead to irremediable mischief. *Middleton v. Franklin*, 238.
10. NUISANCE, WHAT CONSTITUTES.—The erection of a steam-engine and machinery, and a grist-mill, in the cellar under an auction store, held not to be such an injury as to require the restraining power of the Court; at least, not until the question of nuisance or not, should be determined by a jury. *Ib.*
11. IDEM, REMEDY.—Even then the remedy at common law is ample. *Ib.*

OFFICE AND OFFICER.

1. **OFFICE, VACATED BY FAILURE TO QUALIFY.**—The neglect of the plaintiff to qualify for the office within the ten days stipulated by law, after his election, was a refusal on his part to serve, and vacated the office, so far as he had any right thereto. *Payne v. San Francisco*, 122.
2. **OFFICER, BEFORE WHOM TO QUALIFY.**—Such qualification must be made before a proper officer, and cannot be made before the Mayor of the City, who has no power to administer the oath of office. *Ib.*

See **ELECTION**; **MANDAMUS**, 4, 5; **QUO WARRANTO**, 1; **SAN FRANCISCO**, 1, 4.

ORDER.

See **APPEAL**, 10, 11.

PARTIES.

1. **PARTIES, WHEN WIFE MAY SUE ALONE.**—The Practice Act permits the wife to sue alone, when the action is between herself and her husband. If it is necessary to introduce other parties, their introduction cannot affect her rights. *Kashaw v. Kashaw*, 812.
2. **HUSBAND AND WIFE, STATUTE CONSTRUED.**—The object of the act is to take away the necessity of suing by *prochein ami*, and being a remedial statute, must be beneficially construed. *Ib.*

See **CONTRACT**, 3; **DIVORCE**, 1; **HUSBAND AND WIFE**, 1; **MORTGAGE**, 1; **PUBLIC OFFICER**; **REPLEVIN**.

PARTITION.

See **TENANTS IN COMMON**.

PARTNERSHIP.

1. **PARTNERS, ACTIONS BY.**—Partners cannot sue one another at law, for any of the business or undertakings of the partnership. This can only be done in Chancery, by asking for a dissolution and an account. *Stone v. Fouse*, 292.
2. **IDEM, DAMAGES.**—If damages accrue in such proceedings, if liquidated, they can be settled by the Court; if unliquidated, by directing an issue to have them ascertained. *Ib.*
3. **IDEM, ACCOUNTING AND DISSOLUTION.**—Plaintiffs cannot sue on this contract in any form, without seeking an account and dissolution. *Ib.*
4. **PARTNERSHIP, CONTINUANCE OF.**—A consignment of merchandise was made to defendants as partners. After the dissolution of the partnership, two sales of a portion of the merchandise were made—one by each partner, who severally received the money: *Held*, that the partnership continued for the purpose of fulfilling engagements; and that the defendants were jointly liable. *Johnson v. Totten*, 343.
5. **NOTICE OF DISSOLUTION NECESSARY.**—To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. *Ib.*
6. **FOREIGN MINER'S LICENSE.**—When a foreign miner, subject to a license tax, was employed by one of a partnership, to work in the mines which were the partnership's property: *Held*, that the employer, and not the partnership, was liable for the tax. *Meyer v. Larkin*, 408.

7. **IDEM, LEVY ON PARTNERSHIP PROPERTY, WHEN A TRESPASS.**—Where the tax collector levied on the property of the partnership, for the tax due by the foreigner thus employed, and sold the whole claim, and dispossessed the plaintiff (one of the partners): *Held*, that he was guilty of a trespass, for which this action was properly brought. *Ib.*

See DEBTOR AND CREDITOR; EVIDENCE, 3; WITNESS, 2.

PLACE OF TRIAL.

1. **PLACE OF TRIAL, CHANGE OF, IN DISCRETION.**—The granting a change of venue is discretionary with the Court below, subject to review only in cases of gross abuse. *Sloan v. Smith*, 410.
2. **IDEM.**—The peculiar condition of things in California is unfavorable to change of the place of trial, or delays in the administration of justice. *Ib.*
3. **IDEM.**—These applications often result in a loss of all the rights involved. *Ib.*
4. **IDEM, AFFIDAVIT WHAT MUST SHOW.**—It will operate against the application, where the affidavit of the party shows, that all the witnesses of his adversary reside in the place from whence he applies to remove the trial. *Ib.*
5. **IDEM, WHAT TO STATE.**—The affidavit should state the facts in such a manner as to enable the Court to draw its own inference, whether or not an impartial trial could be had in the particular case. If it fail in this, it will not warrant the Court in changing the venue. *Ib.*
6. **PLACE OF TRIAL, MOTION FOR CHANGE TOO LATE.**—Where a motion was made to change the venue, on the ground that neither of the parties resided in the district; where no objection was made in the answer, and after nearly six months had elapsed before the objection was taken: *Held*, that the motion came too late, and was properly rejected. *Thoms v. Randall*, 438.

PLEADING.

1. **PLEADING, OFFICIAL CAPACITY WHEN TO BE SHOWN.**—To entitle a party to recover as Street Commissioner of San Francisco, he must show, not only that he had discharged his duties, but, 1st, that he had been lawfully elected; 2d, had qualified himself to hold the office, by taking the oath and filing the bond, at the time and in the manner required by law. *Payne v. San Francisco*, 122.
2. **PLEADING, MATTERS OF FORM NOT SUBJECT TO DEMURRER.**—Objections to a declaration, when they arise from matters of form, are not the subject of a demurrer. *Otero v. Bullard*, 188.
3. **IDEM, COMPLAINT IN CONVERSION.**—In the action of detinue, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment, or finding. *Ib.*
4. **DESCRIPTION OF PROPERTY.**—This Court cannot say whether the description of the property might have been more accurate. *Ib.*
5. **PLEADING, CONSTRUCTION OF.**—A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as the agents of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cochran v. Goodman*, 244.
6. **IDEM, COMPLAINT IN HÆC VERBA.**—Where the complaint, in *hæc verba*, set forth the bill of sale, it was held to remedy a defect in the description of the quantity of the goods sold, a party must be presumed to know what was intended by his own account. *Ib.*

INDEX.

7. PLEADING, CAUSES OF ACTION WHICH MAY BE UNITED.—The contract declared on contained a covenant for stipulated damages, and by the same contract, the parties were constituted partners. The plaintiffs prayed judgment for the liquidated damages, and for an account, and dissolution of the partnership. Defendant demurred, assigning for cause that two causes of action, the one of legal and the other of equitable jurisdiction, could not be joined, and the District Court sustained the demurrer. *Held*, that this was error. *Stone v. Fouse*, 292.
 8. ESTOPPEL, WHEN PLEADED.—A technical estoppel only is required to be specially pleaded, which is only by deed to the party pleading, or to one under whom he claims, or by matter of record. *Hosler v. Hays*, 302.
 9. RES ADJUDICATA, DISMISSAL OF ACTION.—Where a bill disclosed that the same subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett v. Kilbourne*, 327.
 10. EQUITY, GROUND FOR RELIEF, INSUFFICIENT ALLEGATIONS.—The allegations of ignorance in making the necessary averments, or of insufficient conduct, in the prosecution of a former suit, does not constitute ground for relief in Chancery. *Ib*.
 11. PLEADING, INSUFFICIENT AVERMENTS.—The declaration was for money loaned, and set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, and that he did pay the same; but did not aver that after paying the draft, he cancelled it, and delivered it up to the defendant. *Held*, that the defects were fatal in this form of action. *Lambert v. Slade*, 330.
 12. INJUNCTION, WHEN WILL NOT LIE.—Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States," that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation: *Held*, that the complaint sets forth no principle on which to base a claim. *O'Conner v. Corbitt*, 370.
 13. PLEADING, MATTER IN ABATEMENT.—Matter in abatement, or which was such at common law, (as the motion in this case,) must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. *Booms v. Randall*, 438.
 14. TRESPASS AND DAMAGES UNITED.—In a complaint for trespass, the plaintiff claimed \$500, the alleged value of the property destroyed, and \$500 damages; defendant demurred on the ground that two causes of action were improperly joined; and the Court below sustained the demurrer. *Held*, that this was error. *Tendesen v. Marshall*, 440.
 15. ANSWER, SET-OFF.—When the defendants were sued as *factors*, it was not necessary to set forth in their answer their claim for disbursements, commissions, etc., by way of set-off. *Lubert v. Chauviteau*, 458.
 16. POSSESSION OF GOODS.—The plaintiff may show the manner in which defendants became possessed of the goods, and though the proof should show that they became possessed of them wrongfully, it will be sufficient to maintain an action against them, as consignees of factors. *Ib*.
- See AMENDMENTS, 1, 2; APPEAL, 17; BAIL BOND, 1, 2; BAILMENT, 6; COVENANTS, 1; ESTOPPEL, 2; FERRY; FINDINGS, 4; FRAUD; GARNISHEE, 1, 2; HUSBAND AND WIFE, 10, 11; INJUNCTION, 4; MANDAMUS, 6; RECEIVER, 1; SET-OFF, 1, 2; VARIANCE; VERDICT, 2; WITNESS, 6.

PLEDGE.

See BAILMENT, 1, 5.

PRACTICE ACT.

1. STATUTORY CONSTRUCTION.—Under the Practice Act, while the mere forms of proceedings are simplified, all that is substantial in the body of the law is preserved, to give it certainty and logical conclusiveness as a science. *Sampson v. Shaffer*, 196.

See REMITTITUR, 2; VERDICT, 3.

PREEMPTION ACT.

See PUBLIC LANDS, 1.

PRESUMPTIONS.

See APPEAL, 7; PLEADING, 6; PUBLIC LANDS, 14; REFERENCE, 2.

PRINCIPAL AND AGENT.

See ACTIONS, 5; CARRIER AND CARRIER; DAMAGES, 9; PLEADING, 15, 16.

PROBATE COURT.

See EXECUTORS AND ADMINISTRATORS, 2.

PROMISSORY NOTES.

1. NEGOTIABLE INSTRUMENT, NOTICE OF NON-PAYMENT PREMATURE.—A promissory note was made before the Act of 1851 (which makes the 4th of July a non-judicial day,) which fell due on the 1st of July, and was payable on the 4th. Held, that notice of non-payment on the 3d was premature, and ineffectual to charge the endorser. *Toothaker v. Cornwall*, 144.
2. *Idem*, ACTION WHEN PREMATURE.—The payee has all of the last day on which his note falls due, in which to pay it, and a suit commenced for its recovery on that day is premature. *Wilcombe v. Dodge*, 260.

PUBLIC LANDS.

1. PREEMPTION ACT—TITLE UNDER PRIOR EQUITIES.—The prospective Preemption Act of Congress of 1841, is expressly confined to the surveyed lands, and was not extended to California at the time of the acts complained of, and the statute of this State, which protects the possession of settlers on public lands, to the extent of 160 acres, was not passed until April, 1852, long after the commencement of this suit. Under neither of these acts can the plaintiff claim any rights, and by his own showing he is a mere trespasser. *O'Conner v. Corbitt*, 370.
2. POSSESSORY ACTION.—An action brought under the Act of 1850, must show that the possession of the plaintiff has been invaded. *Id.*

PUBLIC OFFICERS.

1. PUBLIC OFFICER, ACTION BY.—Nor will a joint resolution of the City Councils, approved by the Mayor, recognizing a party as Street Commissioner, enable him to recover for services rendered in that capacity, upon a *quantum meruit*. *Payne v. San Francisco*, 122.

PUEBLO LANDS.

1. MEXICAN LAW, TOWNS OWNERS OF LANDS.—By the laws of Mexico, towns were invested with the ownership of lands. *Cohas v. Raisin*, 443.

INDEX.

2. **ALCALDE POWER TO MAKE GRANTS.**—By the laws, usage, and custom of Mexico, the Alcaldes were the heads of the Ayuntamientos, or town councils; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns. *Ib.*
3. **SAN FRANCISCO, TITLE TO PUEBLO LANDS.**—Before the military occupation of California by the army of the United States, San Francisco was a Mexican Pueblo, or municipal corporation, and was invested with title to the lands within her boundaries. *Ib.*
4. **ALCALDE GRANTS, PRESUMPTIONS.**—A grant of a lot in San Francisco, made by an Alcalde, whether a Mexican or of any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the Pueblo. *Ib.*
5. **PUEBLO LANDS.**—Under the Mexican laws, municipal lands become the absolute property of the Pueblo, subject only in their disposition to the general laws of Mexico. *Ib.*
6. **IDEM, RIGHTS OF SAN FRANCISCO IN.**—The occupation and subsequent acquisition of California by the United States did not suspend or determine any rights or interest of San Francisco in such lands. And if any interest passed to the Government of the United States by the said acquisition, it has been reconveyed by the Act of Congress of March 3d, 1851, entitled, "An Act to Ascertain and Settle the Private Land Claims in California." *Ib.*
7. **ALCALDE, VALIDITY OF ACTS OF.**—It is too late to question the authority of an Alcalde elected in 1846. If invalid, his acts as a *de facto* officer must be held good by this Court. *Ib.*
8. **ALCALDE GRANTS, RIGHTS UNDER.**—The title acquired by San Francisco, by virtue of the Act of Congress of March 3d, 1851, to the Pueblo lands, must enure to the benefit of *bona fide* holders under her grants. *Ib.*
9. **PUEBLO, RIGHTS OF, TO MUNICIPAL LANDS.**—The Pueblo retained, during the war, all its rights to municipal lands which had been conferred upon it previous to the war. The right to alienate is incident to that of ownership. The fact that this right was exercised by the municipality from 1835 to 1850 without question or restriction, would prove the usage and custom in the absence of law. *Ib.*
10. **IDEM.**—The Pueblo had the same right to dispose of its property during the war as a natural person. *Ib.*
11. **ALCALDE GRANTS.**—All grants made by the Alcalde from the beginning of 1835 to near the end of 1839 were made by the authority of the Ayuntamiento. *Ib.*
12. **GRANTS BY JUSTICES OF PEACE.**—The grants made by Justices of the Peace from 1839 to the end of 1843, were made by virtue of authority conferred on them in the absence of Alcaldes by the Departmental Junta, in virtue of Art. 180 of the law of March 17, 1837. *Ib.*
13. **PUEBLO GRANTS.**—The grants made in 1844 by Alcaldes were made by virtue of their office, as constituting the municipal government of this Pueblo, under Governor Micheltoreno's Proclamation of November 4th, 1843. *Ib.*
14. **IDEM, PRESUMED, MADE BY AUTHORITY.**—Grants made after the 15th September, 1847, must be *presumed* to be made by the authority of the Ayuntamiento, or Council, so long as that body existed. *Ib.*

QUO WARRANTO.

1. **TITLE TO OFFICE.**—Title to an office cannot be tried upon a mandamus, neither at common law, nor under the statute. *People v. Olds*, 167.

2. **USURPATION OF OFFICE.**—The Practice Act provides a remedy "against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise within the State." *Ib.*

See **MANDAMUS**, 5.

RAILROAD.

1. **NEGLIGENCE, LIABILITY FOR.**—Defendants were owners of a private railroad, constructed by them, and run with machinery under a license from the City Councils, through certain streets of San Francisco. The plaintiff claimed damages for injuries done to himself, his horse, and wagon, in a collision with the railroad cars, charging the defendants with negligence. *Held*, that where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care. *Wilson v. Cunningham*, 241.

RECEIVER.

1. **RECEIVER, APPOINTMENT OF.**—When the allegations of the bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver—the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business. *Williamson v. Monroe*, 383.

REDEMPTION.

See **SHERIFF AND SHERIFF'S SALE**, 2.

REFERENCE.

1. **REFERENCE, STATUTE CONSTRUED.**—The statute concerning references does not require that referees should be sworn. The imposition of an oath by the Court would be of no effect, other than to put it in the power of the referee to commit a moral perjury, without becoming amenable at law. *Sloan v. Smith*, 406.
2. **IDEM, OATH OF REFEREE.**—If the Legislature had intended that referees should be sworn, it would be presumed in this case that they were sworn, the contrary not appearing. *Ib.*
3. **REPORT OF REFEREE, PRACTICE SETTING ASIDE.**—Judgment is entered upon a report of referees as matter of course, and the only mode to take advantage of it is, by moving to set it aside, as on motion for a new trial. *Ib.*
4. **REFERENCE, REPORT OF REFEREE.**—The report of a referee, like the finding of a Court, should state the facts found, and the conclusions of law thereupon. *Lambert v. Smith*, 408.
5. **IDEM.**—When the report found generally a sum of money for the plaintiff, without finding the facts out of which this finding arose: *Held*, that it was error. *Ib.*
6. **REFERENCE, REPORT OF REFEREE CONSTRUED.**—A case was submitted to a referee to find the interest of B., and the value of such interest, in a vessel and cargo. He found such interest and value in the ship, but not in the cargo, and reported that he was unable, for want of evidence, to find the value of B.'s interest in the cargo. *Held*, that this was equivalent for the purpose of legal adjudication, to finding no value whatever. *Montiflori v. Engels*, 431.

REGISTRY ACT.

See **DEED**, 3; **EVIDENCE**, 5.

REMITTITUR.

1. **EXECUTION, AFTER REMITTITUR FILED.**—Where a cause is remitted from this Court, to a District Court, the clerk of the District Court may issue an execution for the costs accrued thereon, without the order of the District Court. *Marysville v. Buchanan*, 212.
2. **REMITTITUR, PROCEEDINGS ON FILING.**—The remittitur from this Court is, by the direction of the 358th section of the Practice Act to be attached by the clerk of the District Court to the judgment roll, and a minute of the judgment entered on the docket against the original entry. The judgment of this Court then stands as the judgment of the District Court. If it award a new trial, the clerk will place the cause on the calendar; if costs, he will, on the application of the party, issue execution for the same. *Id.*
3. **IDEM, RIGHT TO EXECUTION.**—The District Court has no authority to prevent the immediate execution of the judgment of this Court so remitted. *Id.*
4. **JUDGMENT ON APPEAL FINAL.**—The judgment of this Court upon appeal, and the costs consequent thereon, is final. *Id.*
5. **IDEM, COSTS.**—The clerk of this Court, in entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed. These words are a sufficient awarding of costs for the clerk of the Court below to issue execution for the same. *Id.*

RENT.

See ACTIONS, 1, 2, 3, 4; FORFEITURE, 1, 2, 3; INJUNCTION, 4; LANDLORD AND TENANT, 1; LEASE, 1, 2, 3; MORTGAGE, 2.

REPLEVIN.

1. **UNDERTAKING, ON CLAIM AND DELIVERY.**—Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it. *Wingate v. Brooks*, 112.

SALE AND DELIVERY.

See BAILMENT, 1, 2, 3, 4; CONSIGNOR AND CONSIGNEE, 1, 2; CONTRACT, 5; DELIVERY, 1.

SAN FRANCISCO.

1. **SAN FRANCISCO, ELECTION OF OFFICERS.**—The act to reincorporate the city of San Francisco, passed the 15th April, 1851, provides that the *first* election for city officers should be held on the fourth Monday of April, 1851; and *thereafter annually* at the *general election for State officers*. The general election was appointed by law to be held on the *first Monday in September of each year*. At the first election for city officers, held on the fourth Monday of April, as above directed, the respondent was elected Mayor of the city, was qualified, and was in the exercise of the functions of his office. At the general election held on the first Monday of September following, the relator received 1101 votes for Mayor, (the whole number given,) was qualified, and claimed the office of the respondent on the 24th of the same month. No notice of the latter election was given, or other measure pursued, by the City Council, under the 4th section of the 2d article of the charter. The respondent refused to surrender the office, and the relator filed this bill asserting his right to it, etc. *Held*, that the election of the relator was valid, and that the means of bringing about the election and the irregularities therein should be disregarded. *People v. Brenham*, 477.

2. **IDEM, CITY CHARTER, CONSTRUCTION OF.**—It is not important to interpret the literal meaning of the word *annually* or the word *or*, as used in the city charter of 1851, respecting the election of municipal officers: the actual and substantial intention of the Legislature is to be sought after. *Ib.*
3. **IDEM, RULE OF INTERPRETATION.**—The best rule of interpretation of the statute in question is to follow the established policy of the government from its origin, which is, to make elective all officers of the State, counties, and cities, at the shortest period which the convenience of the public will permit. *Ib.*
4. **OFFICE, TERMS OF.**—Official terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary. *Ib.*

See PUEBLO LANDS, 3, 8.

SET-OFF.

1. **PLEADING, SET-OFF.**—The captain of a vessel drew on his owner for \$600, to defray the expenses of the first mate, who was injured on the voyage, and who it became necessary to leave on shore for his recovery. In an action by the captain against the owner for wages, the owner claimed to set off \$450 of the amount of the draft against the claim, on the ground that he was liable for it, but did not produce the draft, or show payment of it: *Held*, that the Court below properly rejected the set-off. *Wakeman v. Vanderbilt*, 380.
2. **SET-OFF, RIGHT TO.**—No right of action can accrue upon a draft-until payment. And where there is no right of action, there is no right of set-off. *Ib.*

See PLEADING, 15.

SHERIFF AND SHERIFF'S SALE.

1. **EXECUTION DEED BY DEPUTY.**—A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. If executed in his own name, it is decisive against the party claiming under it. *Lowes v. Thompson*, 266.
2. **EXECUTION, LIABILITY OF REDEMPTION.**—Where land was sold at sheriff's sale, the proceeds of which did not amount to the whole judgment, leaving a balance unpaid, and was afterwards redeemed under the statute, *Held*, that the party redeeming (who was an assignee of the judgment debtor) was bound to pay the whole of the plaintiff's judgment, and not merely his bid with interest, and 18 per cent.; and that the lien of the judgment continued till the balance was paid. *Vandyke v. Herman*, 295.

See EXECUTION, 1, 2; MORTGAGE, 2.

SPECIFIC PERFORMANCE.

See FRAUD.

STATEMENT.

1. **NEW TRIAL, STATEMENT, WHAT REQUISITE.**—If the statement filed in support of a motion for a new trial, under the 195th section of the Practice Act, is not sealed by the Judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be sealed by the Judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected. *Linn v. Twist*, 89.

STATE SOVEREIGNTY.

See MINES AND MINING CLAIMS, 3, 4.

STATUTE OF FRAUDS.

1. **IDEM, WHAT CONSTITUTES CHANGE OF POSSESSION.**—Where no question is raised as to the validity of the contract, or the effect of the Statute of Frauds, and where the question is as to the kind of delivery which effects a change of property, although the goods cannot be immediately delivered, the delay may be implied as one of the stipulations. *Stevens v. Stewart*, 140.
2. **SYMBOLICAL DELIVERY, WHEN EFFECTUAL.**—But, where delivery of the goods is necessary to make the contract, a symbolical delivery can only be effectual where it can be followed by an actual delivery. *Ib.*

See DELIVERY, 1, 2.

STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION.**—In construing a statute, the sections must be taken together, and that interpretation should be placed upon the language, which will give the particular section utility and effect, make it compatible with common sense, and the plainest principles of justice. *Burnham v. Hays*, 115.
 2. **IDEM, IN GENERAL.**—In construing statutes, force and meaning should be given to every part, and Courts will not, except when the language is so vague and indefinite as to be wholly destitute of meaning, reject any portion. *Chever v. Hays*, 471.
 3. **IDEM.**—The hardship of a rule in special cases is no solid argument against it. *Ib.*
- See ATTACHMENT, 2, 3; COSTS, 2, 5; COURTS, 10; DEED, 3, 6; GAMING, 1, 2, 3, 4, 5, HUSBAND AND WIFE; FORCIBLE ENTRY AND DETAINER, 1; MANDAMUS, 1; MECHANIC'S LIEN, 1, 2; PARTIES, 1, 2; PRACTICE ACT; QUO WARRANTO, 2; REFERENCE, 1, 2; SAN FRANCISCO, 2, 3; VERDICT, 3; WITNESS, 1.

STIPULATIONS.

See APPEAL, 3, 2; ATTORNEY AND COUNSEL, 2; CONTINUANCE, 1.

STREET RAILROADS.

See RAILROAD, 1.

SUBROGATION.

See MORTGAGE, 1.

SUMMONS.

1. **SUMMONS, SERVICE OF.**—Where defendant's attorney accepted service of the summons, but attached no date, the date of the return of the sheriff was held sufficient. *Crane v. Brannan*, 192.
2. **IDEM, VALIDITY OF.**—Where the summons was headed with the words, "District Court," but was issued out of the County Court, under the County Court seal, and testified by the Judge of said court, it was held good as the writ of the County Court. *Ib.*
3. **IDEM, SHERIFF'S RETURN.**—Where the place where the writ was served was not stated, but it was directed to the sheriff of San Francisco, and was returned by him served, the Court should have assumed that it was served within his jurisdiction. *Ib.*
4. **SUMMONS, INSUFFICIENT RETURN OF.**—A summons issued from a Justice of the Peace, at the suit of respondent against appellants, designated in no other way than by the name of "Adams & Co.," which was returned served by "leaving a

copy thereof with Captain Charles B. Macy." No one appeared for defendants on the return day, and the Justice gave judgment against the defendants for \$369. There was nothing on the record to connect Macy with the defendants. Defendants appealed to the County Court of Yuba County, who affirmed the judgment. *Held*, that the judgment was bad. *Adams v. Town*, 247.

See GARNISHEE, 2; WITNESS, 6, 7.

SUPREME COURT.

1. JURISDICTION OF SUPREME COURT ON APPEAL.—By the Constitution, this Court has appellate jurisdiction in all cases where the matter in dispute exceeds \$200; and this Court and each of its Justices are expressly authorized to issue all *writs* and process *necessary* to the exercise of its appellate jurisdiction; and by the 7th section of the Judiciary Act, have authority to issue all *writs necessary and proper* to the complete exercise of the powers conferred by the Constitution; and under these provisions, this Court has power to issue a writ of error to the County Court, when no express provision by law exists by which such case can be brought into this Court, without process issuing from it. *Adams v. Town*, 247.

SURPRISE.

See NEW TRIAL, 2.

TAXATION.

See EVIDENCE, 6, 7; PARTNERSHIP, 6, 7.

TENANT IN COMMON.

1. TENANT IN COMMON, RIGHT OF ACTION.—One tenant in common cannot sustain an action of forcible entry and detainer against another, for holding over. He must first resort to a court of equity for a partition of the land in dispute. *Lick v. O'Donnell*, 59.

See DEED, 2.

TORT.

See ACTION, 5; WITNESS, 5.

TRESPASS.

1. ACTION FOR.—A trespass dies with the trespasser. *O'Connor v. Corbitt*, 370.

See PARTNERSHIP, 7; PLEADING, 14; NUISANCE, 5.

TRIAL.

See CONTINUANCE, 1; DEPOSITIONS, 1, 2; FINDINGS, 3.

TROVER AND CONVERSION.

See ACTIONS, 5, 6.

TRUST.

See BAILMENT, 5; HUSBAND AND WIFE, 7.

UNDERTAKING.

See ARREST, 3; REPLEVIN.

USE AND OCCUPATION.

See INSTRUCTIONS, 2.

VARIANCE.

1. **VARIANCE, WHEN MATERIAL.**—Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. C. McKinley and C. Campbell & Co., held, that the variance was important and substantial, and that the District Court erred in admitting it in evidence. *Cotes v. Campbell*, 191.

VENUE.

See PLACE OF TRIAL.

VERDICT.

1. **VERDICT, AMENDMENT OF.**—The Court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties. *Perkins v. Wilson*, 137.
2. **IDEM.**—Where there were two defendants, and each answered separately, one denying any connection with the contract declared upon, or liability under it, the other confessing and avoiding it, and claiming damages against the plaintiff, and the jury found against the plaintiff, and in favor of the defendants, and the pleadings and evidence both show that but one defendant was entitled to recover. *Held*, that the Court below did not err in amending the verdict so as to render it conformable to the case. *Ib*.
3. **VERDICT, COURT MAY DIRECT.**—The Practice Act confers express authority upon the Courts below to direct a special verdict. *Burritt v. Gibson*, 396.
4. **EXCEPTIONS TO VERDICT.**—When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issues presented by the pleadings, will not be sustained. *Ib*

See DAMAGES, 1, 2; FINDINGS, 1.

VESSEL.

See LIEN, 1.

WASTE.

See FORFEITURE.

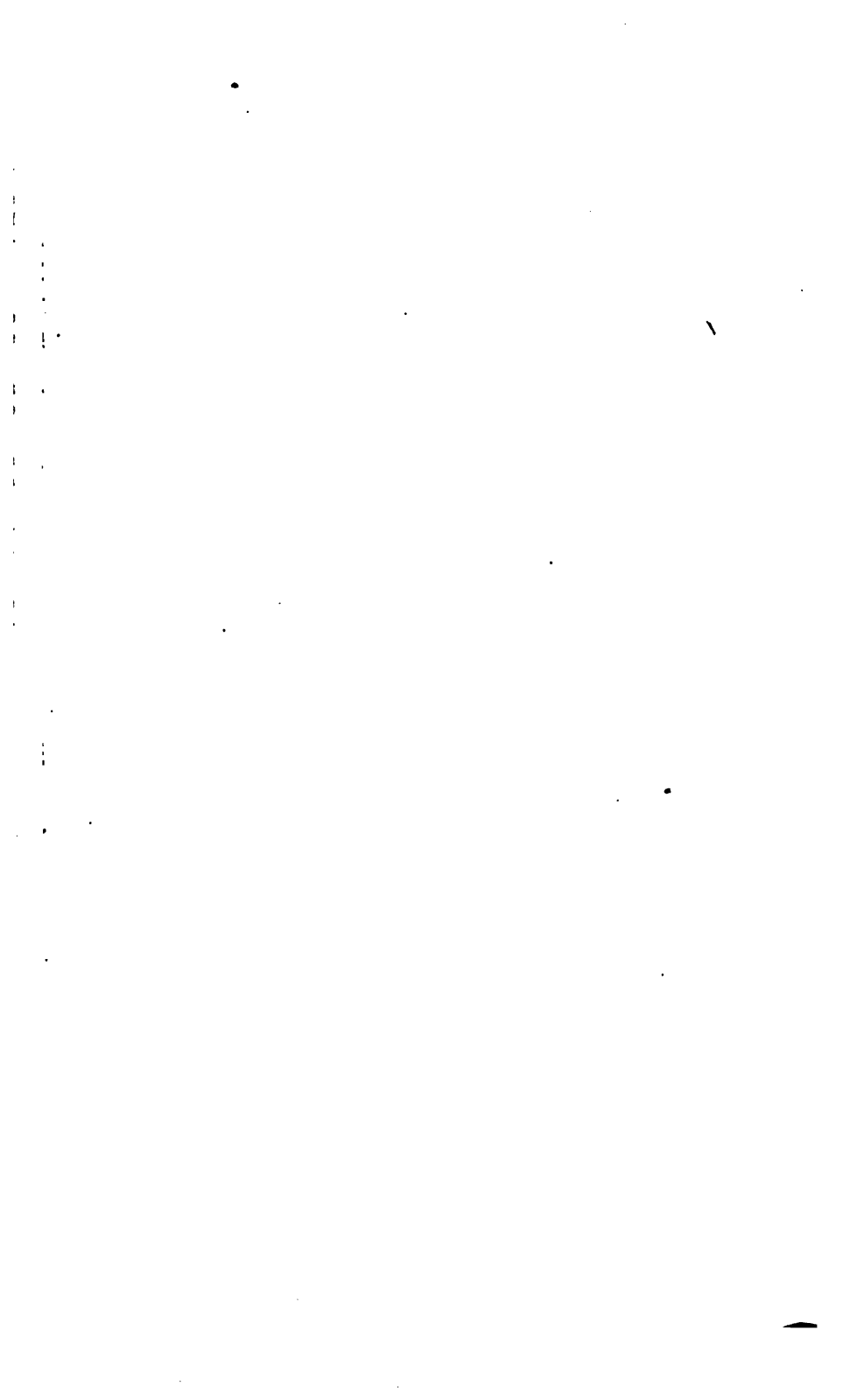
WATER AND WATERCOURSES.

1. **WATER RIGHTS.**—The foundation of a right to water is the first possession; and this right is usufructuary, and consists not so much in the fluid itself as in its use. The owner of land over which it flows has the right to its use during its passage. This right is not in the *corpus* of the water, and only continues with its possession. *Eddy v. Simpson*, 249.
2. **IDEM, RIGHT WHEN LOST.**—When the water of a stream leaves the possession of a party, all his right to and interest in it is gone. *Ib*.
3. **IDEM, RIGHT TO INCREASE.**—If the water of stream A be diverted from its natural channel by C and used by him, and then flows from his works into stream B by natural channels, it is lost to the first possessor, and he cannot reclaim it on the ground that the water of stream B was increased by his means. *Ib*.

4. *IDEM*.—If the water of stream B be in the possession of another party, D, the addition made to it, flowing from the works of C, becomes a part of the body of water, and D has the right to its possession and use, and C has no right to withdraw it. *Ib*.

WITNESS.

1. *WITNESS, COMPETENCY OF*.—A co-defendant is not a competent witness, under the 423d section of the Practice Act, upon an issue where his testimony would enure to his own benefit. *Sparks v. Kohler*, 299.
2. *CO-DEFENDANT, WHEN COMPETENT*.—He would be a competent witness to show that his co-defendant was not his partner, for this, in a legal point of view, would be against his interest. *Ib*.
3. *IDEM, WHEN INCOMPETENT*.—But to show error in the Court below, rejecting such witness for incompetency, the record should show the specific purpose for which he is offered. *Ib*.
4. *IDEM, WHEN PROPERLY REJECTED*.—Where such co-defendant was called generally as a witness, and he was clearly incompetent on one of the issues: *Held*, that the Court below properly rejected him. *Ib*.
5. *WITNESS, COMPETENCY OF*.—Where the evidence of one defendant is as available to himself as to his codefendant, this Court has always held that one is incompetent to testify for the other. And the same rule prevails under like circumstances, where the declaration is in tort, and the defendants are charged as joint tortfeasors. *Johnson v. Henderson*, 368.
6. *WITNESS, COMPETENCY OF*.—Under the statute, a defendant cannot be a witness for his codefendant, where the defence is general, and would operate in discharge of both. *Buckley v. Manife*, 441.
7. *IDEM*.—And the rule is the same where but one defendant is upon trial, the other not having been served with process in time. *Ib*





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